IMPORTANCE OF *NEEBEE* («WATER») AND *NEEBEE* MANAGEMENT IN JAMES BAY CREE TERRITORY

THE NEED TO END GOVERNMENT MARGINALIZATION OF THE JAMES BAY CREES

BRIEF OF THE GRAND COUNCIL OF THE CREES (EEYOU ISTCHEE) TO QUÉBEC'S COMMISSION ON WATER MANAGEMENT

DECEMBER 1999

SUMMARY

Water or *neebee* is intricately involved in all aspects of James Bay Cree life. Safeguarding the integrity of our northern environment is inseparable from the conservation and management of our water resources. Yet *neebee* has also been, and continues to be, the focal point of bitter disputes and conflict between the Québec government and the James Bay Cree People. Since the early 1970s, most of our court cases have involved *neebee*-related issues.

The persistent problems and conflicts we face in regard to *neebee* go well beyond the resource itself or related questions of development and management. Throughout our history, the James Bay Cree People has suffered massive encroachment and dispossession in *Eeyou Istchee*, our traditional territory. These colonial actions - many of which still continue - have had far-reaching adverse effects on our lands, waters and other resources, and our northern environment. These acts serve to erode or otherwise undermine our fundamental status and rights. They illegitimately impede our ongoing development as a distinct People and Nation.

As a result of our historical and ongoing situation, it is concluded that an examination of the scientific and technical aspects of water management *per se* will never result in a suitable and lasting policy for our traditional territory. Such a narrow approach would run counter to the very principle of sustainable development.

As the United Nations Environment and Development Programme strongly recommends, a human rights approach must be adopted in formulating any sustainable development strategy. Considering the profound significance and role of *neebee*, this approach must be fully and fairly applied to water management policy.

In the contemporary context, it is not possible to avoid a human rights approach and still address water management effectively in *Eeyou Istchee*. First, water management encompasses a number of fundamental aspects that are interrelated and interdependent. These include: environment, development, peace and human rights. Second, a human rights approach is also mandatory from the viewpoint of democracy. The principle of democracy and the protection of Aboriginal and Treaty rights are underlying constitutional principles and values in Canada. Therefore, it would be imperative that these principles be respected at every stage of water policy consultation, planning and development.

Third, a human rights approach is especially compelling when Indigenous Peoples and our lands and resources are involved. This has been explicitly recognized by the United Nations Human

Rights Committee. Fourth, in view of the dispossession and marginalization faced by Indigenous Peoples, a human rights approach is indispensable in order to both avoid and resolve conflicts.

The indivisible, interdependent and interrelated nature of our human rights complements and reinforces our perspective of the integrity of the environment and resources of *Eeyou Istchee*. The environment and its resources and ecosystems - of which we are a part - are also integral and interdependent in nature. These complex relationships must be respected and preserved in any new water policy for *Eeyou Istchee*.

The lack of an adequate land and resource base is threatening the survival of the James Bay Crees as a distinct culture and People. It also serves to prevent the effective exercise of our right to self-government throughout *Eeyou Istchee*. These conclusions are wholly consistent with the findings of the Royal Commission on Aboriginal Peoples. In this regard, the RCAP recommendations have been strongly endorsed by the U.N. Human Rights Committee.

In assessing Québec's strategies and policies from a human rights perspective, the conclusions are extremely bleak for Aboriginal Peoples. Marginalization, exclusion, discrimination and domination are most often the prevailing factors. These elements are especially pervasive, where resource and development issues are concerned.

Past and present evidence of inappropriate policies and actions by the Québec government against the Crees and other Aboriginal Peoples is elaborated in this Brief. These government strategies and policies constitute grave violations of the democratic principle, as well as human rights. Such approaches must be condemned and replaced with a principled framework.

To a large degree, the policies and strategies of the Québec government concerning the James Bay Crees and other Aboriginal Peoples are dictated by its political agenda towards Québec sovereignty. Our human rights are accorded little or no consideration. Aboriginal peoples' status and rights are recognized solely in a manner that may not «impede» the government's secessionist aspirations.

In order to break the cycle of dependency, an alternative and constructive approach would be for governments to negotiate new arrangements with Indigenous Peoples based on the principle of sharing. Consistent with our right of self-determination and our right to development, such arrangements must recognize our rights to use, develop, manage and control water and other resources in *Eeyou Istchee*. In some circumstances, joint cooperation and management regimes could also prove beneficial.

Indigenous peoples are aware of the fact that unless they are able to retain control over their land and territories, *their survival as identifiable, distinct societies and cultures is seriously endangered*.

R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* (Tokyo: United Nations University Press, 1990)

All life depends on water - indeed, life probably began in water. Water's curious heat-retaining properties steady the climate and make life on our planet sustainable. Without clean water, disease and misery take their toll. Without water we die.

M. de Villiers, *Water* (Toronto: Stoddart, 1999)

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. BACKGROUND - THE JAMES BAY CREES AND *EEYOU ISTCHEE* 3
- 1.1 Profound relationship with lands, waters, resources and environment 5
- 1.2 Stewardship responsibility for present and future generations 6
- 1.3 Principle of sharing 7

II. MANDATE OF THE COMMISSION ON WATER MANAGEMENT 10
- 2.1 Jurisdictional questions 10
- 2.2 Need for a comprehensive approach 11
- 2.3 Need to recognize regional differences in Eeyou Istchee 13
- 2.4 Importance of constitutional principles and values 14

III. INSTITUTIONAL CHALLENGES FACING THE CREES 16
- 3.1 Breaking down the barriers of exclusion and marginalization 16
- 3.2 Denial of Cree self-government in Eeyou Istchee 18
- 3.3 Role of the James Bay Advisory Committee on the Environment (JBACE) 22

IV. ESSENTIAL NATURE OF WATER 24
- 4.1 Profound significance of water for James Bay Crees 25
- 4.2 Importance of Cree perspective 26

V. IMPORTANCE OF HUMAN RIGHTS APPROACH 27
- 5.1 *James Bay and Northern Québec Agreement* and human rights 30
- 5.2 Indivisible and interdependent nature of human rights 32
- 5.3 Status of James Bay Crees as a «People» 35
- 5.4 Right of Cree People to self-determination 37
- 5.5 Right to enjoy and utilize natural wealth and resources 39
- 5.6 Right to own means of subsistence 41
- 5.7 Right to own institutions 42
- 5.8 Right to equality and non-discrimination 44
- 5.9 Right to be different 45
- 5.10 Right to territorial security 47
- 5.11 Right to an adequate land and resource base 47
- 5.12 Right to development 51

VI. SUSTAINABLE DEVELOPMENT AND THE JAMES BAY CREES 55

VII. PRINCIPLE OF CREE CONSENT 59
7.1 Duty to consult and negotiate and principle of Cree consent 59
7.2 Hydro-Québec policy on community consent 63

VIII. QUÉBEC GOVERNMENT STRATEGIES - MARGINALIZING THE CREES 64
8.1 Québec's Aboriginal policy driven by sovereignty agenda 66
8.2 Denial of Cree fundamental status and rights 66
8.3 Refusal to recognize «inherent» Cree rights 68
8.4 Extinguishment policy of Québec and federal governments 69
8.5 Undermining of future Treaty-making by Aboriginal Peoples 71
8.6 Arguments of «*terra nullius*» by Québec government 73
8.7 Inappropriate use of «territorial integrity» and «effectivity» strategies 74
8.8 Imposition of unfair land selection criteria 77
8.9 Unilateral appropriation of Cree traditional territory 78
8.10 Abdication of environmental role and responsibilities 79
8.11 Denial of Cree rights of participation and consent 82
8.12 Promotion of cultural genocide 86
8.13 Violation of constitutional principles and values 87
8.14 Environmental racism and environmental justice 88

CONCLUSIONS AND RECOMMENDATIONS 90

ANNEX I: OVERVIEW OF ISSUES OF CONCERN IN *EEYOU ISTCHEE* AND RELATED RECOMMENDATIONS 100

1. IMPACTS OF LA GRANDE HYDROELECTRIC PROJECT - EXTENSIVE AND ONGOING CONCERNS 100
2. RESERVOIRS - DENIAL OF ACCESS TO KEY INFORMATION 101
3. MERCURY - GOVERNMENT INDIFFERENCE AND NEGLECT 103
4. PUBLIC SECURITY AND INSPECTION OF DAMS 106
5. HYDROELECTRICITY, FORESTRY AND MINING - NEED TO MONITOR ECOLOGICAL EFFECTS OF LAND USE CHANGES 107
6. CLIMATOLOGY, HYDROLOGY AND WATER POWER 111
7. WATER SUPPLY AND WASTE WATER MANAGEMENT 113

ANNEX II: GROUNDWATER CONCERNS IN *EEYOU ISTCHEE* AND RELATED RECOMMENDATIONS 115

LIST OF AUTHORITIES 118

ABBREVIATIONS

Alta. L. Rev.	Alberta Law Review
Am. J. Int'l L.	American Journal of International Law
A.L.R.	Australian Law Reports
Aust. Y.B.I.L.	Australian Yearbook of International Law
BAPE	Bureau d'audiences publiques sur l'environnement
C.N.L.R.	Canadian Native Law Reporter
D.L.R.	Dominion Law Reports
F.C.T.D.	Federal Court Trial Division
I.C.J.	International Court of Justice
I.L.M.	International Legal Materials
Indian Claims Commission Proc.	Indian Claims Commission Proceedings
JBACE	James Bay Advisory Committee on the Environment
JBNQA	James Bay and Northern Agreement
J. Envtl. L. & Litig.	Journal of Environmental Law & Litigation
Md. J. Contem. Legal Issues	Maryland Journal of Contemporary Legal Issues
NJCL	National Journal of Constitutional Law
Ont. C.A.	Ontario Court of Appeal
O.J.	Ontario Judgments
Ont. Sup. Ct.	Ontario Superior Court
QL	Quicklaw
R. du B.	Revue du Barreau
R.J.Q.	Recueil de jurisprudence du Québec
R.S.Q.	Revised Statutes of Québec
Sask. L. Rev.	Saskatchewan Law Review
S.C.	Statutes of Canada
S.C.C.	Supreme Court of Canada
S.C.J.	Supreme Court Judgments
S.C.R.	Supreme Court Reports
S.Q.	Statutes of Québec
Tul. Envtl. L.J.	Tulane Environmental Law Journal
Transnat'l L. & Contemp. Probs.	Transnational Law & Contemporary Problems
U.N. Doc.	United Nations Document
Va. Envtl. L.J.	Virginia Environmental Law Journal
W.W.R.	Western Weekly Reports

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THE NEED TO END GOVERNMENT MARGINALIZATION OF THE JAMES BAY CREES

INTRODUCTION

1. *Neebee* (Cree word for «water») and *neebee* management will always remain at the centre of the way of life, daily activities and ongoing development of the James Bay Crees in *Eeyou Istchee* - our traditional territory in and outside northern Québec.

2. In terms of our history, culture and survival, *neebee* has always been, and continues to be, of crucial significance to Cree individuals, Cree communities and the James Bay Cree Nation. *Neebee* is vital to the well-being of our traditional territory and its flora and fauna, and to the integrity of our sub-Arctic environment as a whole. Since we view ourselves as an integral part of our natural environment, the importance of *neebee* to us has profound and diverse dimensions.

3. *Neebee* has also been, and continues to be, the focal point of bitter disputes and conflict between the Québec government and the James Bay Cree People. Since the early 1970s, most of our court cases have involved *neebee*-related issues. In light of the life-giving and sustaining characteristics of this essential resource, we are committed to safeguarding its quantity and quality for present and future generations of our People in *Eeyou Istchee*.

4. By ensuring the integrity of our expansive northern environment, including the water and other resources in *Eeyou Istchee*, we aim to contribute substantially to the protection of the global environment and all living things. In this way, we seek to enhance the well-being of not only our own People but of all of humankind.

5. For decades, the Grand Council of the Crees has been gravely concerned that the James Bay Cree People has been marginalized by the Québec government on water-related issues affecting *Eeyou Istchee*. This ongoing problem is not limited to *neebee* but relates to the use and management of natural resources generally in our traditional territory.

6. As explained further in this Brief, we oppose the position of the Québec government that the Bureau d'audiences publiques sur l'environnement (BAPE) is the preferential body to hold consultations in our region. We strongly object that the government seeks to undermine and minimize the role of entities established under our land claims Treaty, the *James Bay and Northern Québec Agreement* (*JBNQA*).

7. In light of these and other concerns, our principal purposes for submitting this Brief are:

   i) to register our firm objection and opposition to BAPE assuming a role that should be undertaken by our own entities, whether based on our Treaty rights under *JBNQA* or on our inherent right to self-determination and other human rights;

   ii) to inform and educate the Québec government, interested institutions and the general public as to the need to engage in a human rights approach that is culturally sensitive, in order to establish a new and equitable policy relating to *neebee* management in *Eeyou Istchee*; and

   iii) to elaborate on the broad range of rights and interests of the James Bay Crees in and to the vital resource of *neebee* and its management.

8. It is important to note that the present Brief is not an exhaustive elaboration of Cree concerns. However, it serves to outline a number of key issues, including: i) Cree concerns with the mandate of the BAPE Commission on Water Management in *Eeyou Istchee*; ii) Cree *neebee*-related rights from a Cree perspective; iii) the relevance of our human rights and the importance of engaging in a human rights analysis; and iv) specific conclusions and recommendations. In the Annex to this Brief, we identify some specific water-related concerns, including those pertaining to hydroelectric development, forestry and mining.

9. For the record, we wish to respectfully state that the Grand Council of the Crees is not a voluntary participant in the BAPE consultation process. Given the particular circumstances and history of the James Bay Cree People in *Eeyou Istchee*, we view BAPE as an outside body that is being imposed on us. We have no choice but to present our views here, since our own forums are being effectively undermined or ignored by the Québec government. This lack of cooperation and denial of rights remains wholly unacceptable to us.

10. The Chairperson of the Commission on Water Management, Mr. André Beauchamp, has demonstrated some flexibility and a spirit of cooperation. While we appreciate his

individual efforts, our mandate is to protect the overall rights and interests of our People and *Eeyou Istchee* in the present context.

I. BACKGROUND - THE JAMES BAY CREES AND *EEYOU ISTCHEE*

11. The James Bay Cree People is an organized society, distinct Nation and People, which includes the nine Cree First Nation communities of Chisasibi, Eastmain, Mistissini, Nemaska, Oujé-Bougoumou, Waskaganish, Waswanipi, Wemindji and Whapmagoostui. In addition, we are an Aboriginal People of Canada within the meaning of s. 35 of the *Constitution Act, 1982*.

12. For thousands of years, the James Bay Cree People has occupied, governed, used, protected, and managed its traditional territory, *Eeyou Istchee*, and continues to do so in a spirit of sharing. Our rights and interests with respect to our traditional territory, including lands, waters and resources, extend beyond the boundaries of Québec and include offshore islands and waters in James Bay and Hudson's Bay.

13. This traditional territory of the Cree People, covers some 400,000 sq. km., most, if not all, of which did not form part of the province of Québec at the time of Confederation in 1867. It was only in 1898 and 1912 that the traditional territory of the James Bay Crees was included in the province of Québec, when the government of Canada annexed what is presently the northern two-thirds of the province to Québec. These vast territorial annexations took place without the knowledge or consent of the Cree people.

> Grand Council of the Crees, *Sovereign Injustice [:] Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec* (Nemaska, Québec, 1995), at pp. 199-217.

14. Throughout our history, the James Bay Cree People has suffered massive encroachment and dispossession in our traditional territory. These colonial actions - many of which still continue - have had far-reaching adverse effects on our lands, waters and other resources, and our northern environment. Moreover, these acts serve to erode or otherwise undermine our fundamental status and rights. They illegitimately impede our ongoing development as a distinct People and Nation.

> ...it is of critical importance to underscore the cultural biases that contributed to

> the conceptual framework constructed to legitimize colonization and the various methods used to dispossess indigenous peoples and expropriate their lands, territories and resources. It is safe to say that the attitudes, doctrines and policies developed to justify the taking of lands from indigenous peoples were and continue to be largely driven by the economic agenda of States.
>
> U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights of Indigenous Peoples: Indigenous people and their relationship to land*, U.N. Doc. E/CN.4/Sub.2/1999/18 (1999) (E.-I. Daes, Special Rapporteur, Second progress report), at p. 9, para. 21.

15. For the past three decades, the Grand Council of the Crees has acted on behalf of and represented the James Bay Cree People in all matters pertaining to its status, rights and interests. Since 1987, the Grand Council has had consultative status as a Non-Governmental Organization (NGO) with the United Nations Economic and Social Council.

16. The Grand Council is also a party to, and a signatory of, the James Bay and Northern Québec Agreement. This Treaty was approved, given effect and declared valid by federal and provincial legislation.

James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-1977, 25-26 Eliz. II, c. 32

An Act approving the Agreement concerning James Bay and Northern Quebec, S.Q., 1976, c. 46

17. The Grand Council continues to strive, both in Canada and internationally, to safeguard and advance the Aboriginal, Treaty and other constitutional and human rights of the James Bay Crees. At the same time, the Grand Council seeks to contribute to the recognition and respect of the fundamental rights of all Indigenous Peoples. We are committed to ensuring fairness and justice under domestic and international law.

> Indigenous peoples are also contributing to global and national environmental protection initiatives. For example, the role of indigenous non-governmental organizations at the United Nations Conference on Environment and Development was critical to the drafting and adoption of chapter 26 of Agenda 21. This is a positive contribution to the world community.

> U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights of Indigenous Peoples: Indigenous people and their relationship to land* (E.-I. Daes, Special Rapporteur, Second progress report), at p. 31, para. 102.

1.1 Profound relationship with lands, waters, resources and environment

18. In considering a new policy on *neebee* management in *Eeyou Istchee*, it is critical to appreciate the profound relationship that we, the James Bay Crees, have with our lands, waters, resources and environment. This special relationship is generally associated with Indigenous Peoples and has been widely recognized in Canada and internationally.

> It is well known that indigenous communities maintain an intricate and salutary relationship with the earth which is basic to their existence and their culture.
>
> > W. Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, (1991) 31 Virginia J. Int'l L. 479 at p. 484.
>
> See also U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7 & Adds. 1-4 (1986) (J. Martínez Cobo, Special Rapporteur), paras. 196 &197.

19. Our relationship with our environment, territory and resources has far-reaching social, cultural, spiritual, economic and political dimensions. If we are to safeguard the present and future of our People and territory, this special relationship must be equitably incorporated into any water policy, strategy or law relating to *Eeyou Istchee*.

> The profound, highly complex and sensitive relationship that indigenous peoples have to their lands, territories and resources must be taken into account in protecting the integrity of their environment from degradation. Again it includes social, economic, cultural, and spiritual dimensions which must not be overlooked in the present discussion. Cultures that have flourished as an integral part of the environment, cannot continue to tolerate disruption. The dependence of indigenous peoples upon the integrity of their lands, territories and resources remains a highly significant factor.
>
> > U.N. Sub-Commission on Prevention of Discrimination and Protection of

> Minorities, *Human Rights of Indigenous Peoples: Indigenous people and their relationship to land*, (E.-I. Daes, Special Rapporteur, Second progress report), at p. 25, para. 79.

20. In international standard-setting processes, it is now widely confirmed that:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 25.

21. This profound relationship of Indigenous Peoples is currently affirmed as a right. It is also recognized that state governments have an obligation to respect that right. For example, in regard to matters relating to lands and resources, the *Indigenous and Tribal Peoples Convention, 1989* states:

> ...governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. (Art. 13, para. 1)

1.2 Stewardship responsibility for present and future generations

22. An integral element of our relationship with our lands, waters, resources and environment is the stewardship responsibility that we have for both present and future generations of Crees. The Royal Commission on Aboriginal Peoples underlines this aspect in the following terms:

> Environmental stewardship is an essential element of all future northern policies and programs ... Central to stewardship is the realistic appreciation that all natural processes and systems are interrelated, that they know no domestic or international boundaries, and that responsible development requires co-operation among human beings and between human beings and the natural world.

> Protecting the northern environment is essential for the physical, emotional and spiritual health of individuals and communities. It is also a matter of economic rationality.
>
> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 4, at pp. 446-7.

23. Safeguarding of the environment and natural resources for both present and future generations has always been a primary concern of Indigenous Peoples. This concept of «intergenerational equity» has now acquired widespread acceptance in Canada and internationally. In particular, the Supreme Court of Canada has portrayed our stewardship responsibilities in terms of both present and future generations.

> *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, paras. 154 & 166.

24. The Stockholm Declaration of 1972 was one of the first international instruments to emphasize a «responsibility to protect and improve the environment for present and future generations..." In addition, the World Commission on Environment and Development reiterates that "States shall conserve and use the environment and natural resources for the benefit of present and future generations."

> *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf. 48/14 (1972), (1972) 11 I.L.M. 1416, Principle 1.
>
> World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987) at 348 (Annex 1), at p. 348, Principle 2.

25. The present Public Consultation Document advocates as a general objective the sustainability of water. In this way, it is said that future generations of Quebecers would have an opportunity to use water for their own development. In our view, it is imperative that the Québec government begin respecting our right of intergenerational equity in *Eeyou Istchee*.

> Ministère de l'Environnement, *Water Management in Québec: Public Consultation Document* (Québec:

Gouvernement du Québec, 1999), at p. 11.

1.3 Principle of sharing

26. It is often declared by non-Aboriginal governments in Québec and elsewhere that it owns the lands and waters in the traditional territories of Aboriginal peoples. Moreover, they claim that their laws can prove this.

27. However, these claims portray a simplistic and self-serving view of history and law. They fail to appropriately take into account the ongoing legacy of colonization and dispossession affecting Aboriginal peoples. Such government attitudes perpetuate out-dated, unjust and discriminatory policies and doctrines. They have no place in the contemporary context of fairness and human rights.

> *Modern international law must be taken to recognize the right of ownership and control of lands and resources by indigenous peoples. This is a proper concern of international law ... A denial of indigenous rights to lands and resources can only be supported by invoking doctrines of racism and colonialism. Ideas of 'discovery' and 'terra nullius' can not be considered legally valid.*
>
> D. Sanders, "Indigenous Participation in National Economic Life", Background paper, United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, Geneva, January 16-20, 1989; reproduced in the *Report on the United Nations Seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States, Geneva, Switzerland, 16-20 January 1989*, E/CN.4/1989/22, 8 February 1989, para. 22, at p. 51 [emphasis added].

28. New and emerging standards relating to Indigenous Peoples confirm our right to own and control the lands, waters and other resources in our traditional territories. For example, the draft *U.N. Declaration on the Rights of Indigenous Peoples* affirms:

> Indigenous peoples have the right to own, develop, control and use the lands and

> territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. (Art. 26)

29. In relation to water and other resources, the James Bay Crees and other Aboriginal Peoples generally advocate a principle of sharing. Our traditional knowledge and practices can serve to make a unique and essential contribution to resource management. While sharing may mean exclusive or preferential rights of use and management in some areas within our traditional territories, other areas may be subject to joint or other cooperative arrangements. Furthermore, land and resources rights are instrumental in providing appropriate support for the effective exercise of self-government.

> Recognition of communal property rights to land and resources fosters good stewardship of resources; open access policies do not. ... Traditional ecological knowledge is not merely information on the local biophysical environment but is a complex system of knowledge, practice and belief. It can be brought to the service of sustainable development through co-management arrangements that foster joint decision-making and power sharing.
>
> F. Birkes & H. Fast, «Aboriginal Peoples: The Basis for Policy-Making toward Sustainable Development» in A. Dale & J.B. Robinson, eds., *Achieving Sustainable Development* (Vancouver: UBC Press, 1996) 204 at p. 256.

30. These Indigenous views are clearly supported by the Recommendations of the Royal Commission on Aboriginal Peoples. In order to foster Aboriginal self-reliance and self-government, it is recommended:

> The goal of negotiations be to ensure that Aboriginal nations, within their traditional territories, have
> (a) exclusive or preferential access to certain renewable and non-renewable resources, *including water*, or to a guaranteed share of them;
> (b) a guaranteed share of the revenues flowing from resource development; and
> (c) specified preferential guarantees or priorities to the economic benefits and opportunities flowing from development projects ...
>
> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(2), at p. 574 [emphasis added].

31. In summary, for the purposes of this Public Consultation, we have chosen to highlight initially three principles that represent important elements of Cree culture, perspectives and background. These are: i) the profound relationship we continue to have with our lands, waters, resources and environment; ii) our stewardship responsibility for present and future generations; and iii) the principle of sharing of water and other resources.

32. To date, these principles have not been adequately recognized and respected in our negotiations and Treaty with the Québec and federal governments. We strongly urge that these and other precepts identified in the Brief be made an integral part of any future framework for *neebee* management in *Eeyou Istchee*. Cree perspectives, values and culture must be respected in a manner consistent with the principles of equality and non-discrimination.

II. MANDATE OF THE COMMISSION ON WATER MANAGEMENT

33. The James Bay Cree Nation is strongly in favour of the establishment of a comprehensive policy on water management in Québec. In view of the far-ranging impacts we have suffered and continue to suffer in *Eeyou Istchee*, it is crucial that an equitable, balanced and culturally-sensitive policy be formulated to address present and future challenges and needs.

34. In terms of the mandate of the Commission on Water Management, it would appear that no limitations have been placed on the subject matters that may be examined. This is especially important under the present circumstances since, throughout its history, Québec has never had a water policy.

> Letter, dated October 29, 1998, from the Hon. Paul Bégin, Minister of the Environment, to M. André Harvey, President of BAPE (re mandate of the Commission).
>
> Ministère de l'Environnement, *Water Management in Québec: Public Consultation Document*, *supra* at p. 46: «The time is ... ripe for Québec ... to establish its first water policy.»

35. In addition, we strongly advocate the adoption of a comprehensive approach that takes regional differences into account. These are important considerations and will be discussed further below.

36. However, as this Commission is already aware, we cannot accept that the formulation of a *neebee* management policy for *Eeyou Istchee* has been delegated by the Québec government to an entity that is alien to us and our territory. Therefore, we will begin our commentary on the mandate of the Commission with this central issue of jurisdiction.

2.1 Jurisdictional questions

37. There are a number of reasons why we oppose the conferral of a mandate by Québec to this Commission to consult the population on water management in *Eeyou Istchee*. These reasons include:

i) **Violation of Cree Treaty rights.** Under the James Bay and Northern Québec Agreement (s. 22.3.24), the James Bay Advisory Committee on the Environment (JBACE) has been established as a «consultative body». It is explicitly designated as «the preferential and official forum» for responsible governments in relation to the whole environmental and social protection regime in our northern territory. The role of JBACE is discussed further below (sub-heading 3.3).

ii) **Undermines Cree status and Cree self-determination.** In addressing important *neebee*-related issues, we choose to act as a People and Nation. It is with this status that we seek to pursue our economic, social, cultural and political development, through our own institutions. We do not accept to be effectively diminished to a «citizens group», pleading our major concerns before a foreign Commission.

iii) **Ongoing major impacts suffered by Crees.** As outlined elsewhere in this Brief, in relation to water, there continue to be numerous and extensive adverse impacts of a diverse nature from major development projects (hydro, forestry, mining) in *Eeyou Istchee*. In view of the extent to which our People and territory are being put at risk, we would expect that Québec would ensure us a substantial and defining role and involvement.

38. For years, we have raised water-related issues with Québec. Our concerns have been repeatedly minimized, dismissed or ignored to our detriment. Now that the government decides it will explore the possibility of a water management policy, it is audacious, to say the least, to think it can deny us an appropriate role of leadership and action.

39. In our Conclusions and Recommendations, we put forward a number of measures that

this Commission can propose to ensure our full role in devising water management policy for *Eeyou Istchee*. Regardless of who may be involved in this policy initiative, there are three aspects that are worth raising at this point. These are: the need for a comprehensive approach; the need to recognize regional differences in *Eeyou Istchee*; and the importance of constitutional principles and values.

2.2 Need for a comprehensive approach

40. It is critical that a comprehensive approach be adopted in relation to *neebee*-related subject matters. Water-related issues at the community level continue to be highly important to the James Bay Crees. However, these must not be the sole or primary focal point in addressing Cree concerns.

41. For too many years, there have been water-related questions pertaining to hydroelectric development, forestry and mining that entail far-ranging and persistent impacts for the James Bay Crees and *Eeyou Istchee* (see examples in Annex, *infra*). These questions must be adequately dealt with in any comprehensive water management policy. Further, we must be a full participant in shaping the issues and seeking adequate approaches and solutions.

> National forest policies should recognize and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers. Appropriate conditions should be promoted for these groups to enable them to have an economic stake in forest use, perform economic activities, and achieve and maintain cultural identity and social organization, as well as adequate levels of livelihood and well-being, through, *inter alia*, those land tenure arrangements which serve as incentives for the sustainable management of forests.
>
> *Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, A/CONF.151/26 (vol. III), Annex III (forest principles), Principle/Element 5(a).

42. In view of our diverse concerns, the Grand Council is in agreement with the Public Consultation Document on water management where it emphasizes that a «comprehensive strategy» for water resources must be formulated. In this regard, the Consultation Document stipulates:

> At the international level, events similar to those seen in recent years (massive water export programs, water diversion projects, ... to name but a few) are likely

> to become more common. It is therefore important for Québec to *develop a comprehensive strategy* for its water resource that combines both protection and harmonious development, *in compliance with its international commitments*.
>
> Ministère de l'Environnement, *Water Management in Québec: Public Consultation Document*, *supra* at p. 39 [emphasis added].

43. The Consultation Document then highlights in the next paragraph that Québec's actions in the area of water management must be exemplary. It further states that the government must, therefore, must not only «remain at the heart of international trends» but also anticipate international «approaches, orientations and rules».

> Québec must continue to *serve as an example* in all areas, including its management of the water resource. Not only must it remain at the heart of international trends, but it must also position itself to anticipate and influence the water-related *approaches, orientations and rules* being developed by the international community.
>
> Ministère de l'Environnement, *Water Management in Québec: Public Consultation Document*, *supra* at p. 39 [emphasis added.].

44. The Grand Council supports an approach to *neebee*-related issues that not only emphasizes full compliance with international rules, but also takes into account international approaches and orientations. However, to date, this is precisely what the Québec government has failed to do in regard to water and other resource issues. Whenever Indigenous Peoples and our fundamental rights, interests and concerns are involved, the standards are curiously altered to our detriment.

45. At the international level, human rights standards relating to Indigenous Peoples are a significant and ongoing concern. As described in this Brief (heading VI), these international norms are an essential component of sustainable development policy. Therefore, we would expect that any future water management policy affecting our People and *Eeyou Istchee* would fully incorporate such international human rights elements.

2.3 Need to recognize regional differences in Eeyou Istchee

46. The mandate of the Bureau d'audiences publiques sur l'environnement (BAPE) explicitly highlights the need to take regional differences into account:

> To distinguish in a specific manner, the elements pertaining to each of the regions concerning the totality of water management in Québec, taking into account as well the concerns of citizens of each of the regions on the question of water management in their territory [Unofficial translation].
>
> Letter, dated October 29, 1998, from the Hon. Paul Bégin, Minister of the Environment, to M. André Harvey, President of BAPE.

47. Regional differences are especially important in regard to water-related issues in northern Québec. First, climatic and other particular features of a sub-Arctic and Arctic environment must be specifically considered. Second, the impacts of large-scale development projects on complex and delicate northern ecosystems may be especially severe and long-lasting. Therefore, in terms of water management policy, special preventative measures and other safeguards must be devised.

48. Third, since the North is the traditional territory of the James Bay Crees and other Aboriginal Peoples, our Aboriginal, Treaty and other constitutional and human rights must be fully respected. Both the substantive and procedural aspects of water management should reflect our fundamental status and rights.

2.4 Importance of constitutional principles and values

49. In terms of any consultative body's mandate, there are certain underlying constitutional principles that are highly relevant to the present context concerning the James Bay Crees and *Eeyou Istchee*. According to the Constitution of Canada, these principles must be respected. These include: the «protection of Aboriginal and Treaty rights», the «principle of democracy» and the «principle of federalism», among others.

> *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, paras. 32 & 82.

50. According to the Supreme Court of Canada, these underlying constitutional principles «infuse our Constitution and breathe life into it». The Court added that «[t]he principles dictate major elements of the architecture of the Constitution itself and are its lifeblood.» Therefore, the far-reaching significance of these principles must be accorded its full

weight in considering the rights and role of the James Bay Crees in regard to water management in *Eeyou Istchee*.

> *Reference re Secession of Québec*, *supra* paras. 50 & 51.

51. In regard to the Aboriginal and Treaty rights of the James Bay Crees, their protection is guaranteed under s. 35 of the *Constitution Act, 1982*. According to the Supreme Court of Canada, this protection is not only a «constitutional principle» but also a «constitutional value».

> *Reference re Secession of Québec*, *supra* para. 82.

52. In regard to the principle of democracy, the Supreme Court has confirmed that Canada is a representative democracy. As a result, the James Bay Crees and other Aboriginal peoples have the «right to effective representation». With regard to critical issues, such as water management in and affecting *Eeyou Istchee*, we clearly must have a meaningful voice in the deliberations of government.

> ...the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to 'effective representation'. Ours is a representative democracy. Representation comprehends the idea of having a voice in the deliberations of government...
>
> > *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 183.

53. Furthermore, it has been repeatedly reiterated by the Supreme Court of Canada that values inherent in the notion of democracy include a «commitment to social justice and equality», as well as «respect for cultural and group identity». Democracy, the Court adds, is «fundamentally connected to substantive goals, most importantly, the promotion of self-government». These democratic values and goals are directly relevant in considering the rights, institutions and processes relating to water management in Cree traditional territory. The constitutional principle of democracy has also been «emphasized as an important remedial consideration» by the Supreme Court of Canada.

> *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 64; ***R.*** v. ***Oakes***, [1986] 1 S.C.R. 103, at 136; ***M.*** v. ***H.***, (1999) 171 D.L.R. (4th) 577, para. 77; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, para. 140.

> *Corbiére* v. *Canada (Minister of Indian and Northern Affairs)*, (1999) 173 D.L.R. (4th) 1, [1999] 3 C.N.L.R. 19 (S.C.C.), para. 117 (re important remedial consideration).

54. With regard to the James Bay Crees, it is the constitutional principles of democracy and protection of Aboriginal and Treaty rights that are continuously being violated by the Québec government. This is especially true whenever water and other resource-related issues in *Eeyou Istchee* are involved.

> Democracy at all levels ... and in all spheres is essential to true development. ... Fundamental to democratic participation is the right of individuals, groups, and peoples to take decisions collectively and to choose their own representative organizations, and to have freedom of democratic action, free from interference.
>
> > U.N. Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, U.N. Doc. E/CN.4/1990/9/ Rev. 1, 26 September 1990, at para. 147.

55. In regard to the principle of federalism, there are those who would define the Canadian federation in terms of solely federal and provincial governments - or else «two founding nations» - in order to exclude or diminish us. However, this is not what the Constitution recognizes. We, as Aboriginal Peoples, have our own Part II of the *Constitution Act, 1982* and we cannot be marginalized or excluded.

> The historic partners of the Canadian Union are heterogeneous: provinces, distinct societies, English-speaking peoples, Aboriginal peoples, French-speaking peoples.
>
> > G. Laforest, «Standing in the Shoes of the Other Partners in the Canadian Union» in R. Gibbons & G. Laforest, eds, *Beyond the Impasse [:] toward reconciliation* (Montreal: Institute for Research on Public Policy, 1998) 51 at p. 66.

> The 'promise' of s. 35 [of the *Constitution Act, 1982*] ... recognized not only the ancient occupation of land by aboriginal peoples, but *their contribution to the building of Canada* and the special commitments made to them by successive governments.
>
> > *Reference re Secession of Québec*, *supra* at para. 82 [emphasis added].

56. Inherent in the principles of federalism, democracy and the protection of Aboriginal and Treaty rights is that cooperation is required among federal and provincial governments and Aboriginal peoples and our governments. This cooperation should take place in a spirit of mutual accommodation, equality and respect for human rights.

57. Such intergovernmental cooperation is clearly necessary in addressing water-related matters.

III. INSTITUTIONAL CHALLENGES FACING THE CREES

3.1 Breaking down the barriers of exclusion and marginalization

58. In terms of national economies, marginalization and exclusion of Indigenous Peoples by non-Indigenous governments is a world-wide problem and racism is most often involved.

> It must be recognized that indigenous participation in national economies has been frustrated by a history of marginalization, racism and exclusion. ... Indigenous peoples have not been shown to lack adaptability. Historically they have been kept out of national economies. This historical exclusion must be recognized and overcome.
>
> D. Sanders, "Indigenous Participation in National Economic Life", Background paper, United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, Geneva, January 16-20, 1989, *supra*, at p. 52, para. 26.

59. These acts by non-Indigenous governments are characterized by alien subjugation, domination and exploitation - in other words, colonialism. This colonialism continues today and most often entails the dispossession of Indigenous Peoples of their territories, lands and resources.

> *Colonialism has not ceased, but continues with even greater intensity* ...[new para.] *First peoples are in the frontline*. They are sitting on resources the rest of

the world wants, and wants at the lowest possible cost. *Their territories are considered frontier lands, unowned, underused and, therefore, open to exploitation*. More often than not their populations are low in density, they are politically weak and physically isolated. And, until recently, their resistance has been relatively ineffective.

> J. Burger, *The Gaia Atlas of First Peoples* (New York: Anchor Books, 1990) at pp. 78-80 [emphasis added].

... the indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting inter alia, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests ...

> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, 5th preambular para.

60. Ongoing domination and other acts of colonization cannot prevent protection of our environment and natural resources in *Eeyou Istchee*. Moreover, such acts are prohibited and condemned under international law.

> The environment and natural resources of people under oppression, domination and occupation shall be protected.
>
> *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf. 151/5/Rev. 1, June 13, 1992, 31 I.L.M. 874 (1992), Principle 23.

... policies promoting or perpetuating ... discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

> *Stockholm Declaration of the United Nations Conference on the Human Environment*, Principle 1.

... the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, *in whatever form and wherever they exist*

> *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble [emphasis added].

61. In order to break down the barriers of exclusion and marginalization, concrete measures need to be taken on an urgent basis. In regard to the water-related matters in *Eeyou Istchee*, these measures include: recognition of our right to use, control and manage our natural resources; and recognition and respect of our human rights. In this context, our right to self-determination and our right to development are especially relevant.

62. Recognition of our rights to resources and self-government continue to be denied by the Québec government. In regard to the environmental and social regime in *Eeyou Istchee*, the consultative body established under the *JBNQA* is being undermined by the Québec government. These problems and their implications are described further below.

3.2 Denial of Cree self-government in Eeyou Istchee

63. In 1975, at the time of the negotiations of the James Bay and Northern Québec Agreement, the Québec and federal governments refused to negotiate genuine self-government with the James Bay Crees. Moreover, federal comprehensive claims policy did not allow these human rights matters to be included in land claims negotiations until the 1980s.

> ... democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities ...
>
> *Reference re Secession of Québec*, *supra*, para. 64.

64. At the time of the *JBNQA* negotiations, the Québec government accommodated some local or regional entities - so long as they had minimal law-making power or resembled Québec's own municipal regime. In relation to the environmental and social protection regime of the James Bay Crees, the Québec and federal governments sought to limit us to advisory powers. Little regard or sensitivity was demonstrated by these governments for our fundamental human rights or for democratic principles.

65. For the benefit of this Commission, we recount here the severe conditions of pressure and duress under which this Agreement was negotiated:

a) construction of the La Grande mega-project was continuing without interruption. Our rights to our lands and waters and way of life - were being taken from us **while we negotiated**;

b) by the time we could reach the Supreme Court of Canada in the *Kanatewat* case **the construction would be completed** or the **balance of convenience would be against us**;

c) the Federal Government was **threatening to cut off funds** we depended upon to defend our rights;

d) all governments were using false and illegitimate arguments to debate us, including that **we had no aboriginal rights or title**. We were told we were squatters. The Agreement was thus negotiated under conditions of **fundamental error**, if governments truly believed what they told us, or under conditions of **fraud** if they did not;

e) the **social position of our people was desperate**, and programs upon which we depended were being cut and frozen, including while negotiations were underway;

f) the governments stated that certain **fundamental matters were non-negotiable**, including the issues of surrender and extinguishment;

g) we were forced to accept structures, **institutions and principles that did not reflect Cree law**, culture or belief but rather those of the dominant societies. This was in contravention of our fundamental right of self-determination including the right to determine our own institutions, and our social, economic and cultural rights;

h) we were obliged to **negotiate against the might of three development corporations and two governments**; and

i) the federal government **failed to assert its fiduciary obligation to protect our rights and interests**. Instead, in this first 'modern' land negotiation, the federal Crown maintained a morally and legally bankrupt position of 'alert neutrality'.

Grand Council of the Crees (of Quebec), *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, November 18, 1993, at p.

8. [emphasis in original].

66. Contemporary standards indicate that the right to self-government cannot be denied to Aboriginal peoples. Yet the Québec government has done little to improve its democratic record in regard to the James Bay Crees and *Eeyou Istchee*.

> *... self-determination is the oldest aspect of the democratic entitlement ...* Self-determination postulates the right of a people in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.
>
> T. Franck, «The Emerging Right to Democratic Governance», (1992) 86 Am. J. Int'l L. 46 at p. 52.

67. In making recommendations on *neebee* management in *Eeyou Istchee*, we urge this Commission to recognize our right to democratic governance through our own institutions (see also sub-heading 5.7 *infra*). In the draft *U.N. Declaration on the Rights of Indigenous Peoples*, our right as Indigenous Peoples to maintain and develop our own institutions is generally highlighted as follows:

> Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to *maintain and develop their own indigenous decision-making institutions*. (Art. 19)

68. Moreover, the draft *Declaration* explicitly links the right of Indigenous Peoples to their own institutions to their water and other resource rights:

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. *This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources*, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights. (Art. 26)

69. The importance of linking the control of our territories and resources to our own institutions is increasingly underlined in United Nations studies and fora.

> An important dimension in affirming indigenous land rights is the exercise of a measure of *control over lands, territories and resources by indigenous peoples through their own institutions*. Though rights to lands, territories and resources may be affirmed, the exercise of internal self-determination, in the form of control over and decision-making concerning development, use of natural resources, management and conservation measures, is often absent.
>
> U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights of Indigenous Peoples: Indigenous people and their relationship to land* (E.-I. Daes, Special Rapporteur, Second progress report), at pp. 25-6, para. 80 [emphasis added].

70. Our right to have a vital role in resource and environmental management - through our own institutions and with our own perspectives, knowledge and practices - cannot be denied.

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.
>
> *Rio Declaration on Environment and Development*, Principle 22.

3.3 Role of the James Bay Advisory Committee on the Environment (JBACE)

71. Under the James Bay and Northern Québec Agreement, our land claims Treaty, the James Bay Advisory Committee on the Environment has been established. This body is made up of members appointed by the Cree Regional Authority, Canada and Québec.

> *James Bay and Northern Quebec Agreement and Complementary Agreements*, 1997 Edition (Québec: Les Publications du Québec, 1996), s. 22.3.1

72. The purpose and mandate of the JBACE is «to review and oversee the administration and management of the environmental and social protection regime» established under chapter 22 of *JBNQA*. The JBACE is formally characterized as «a consultative body to

responsible governments». As such, it is «the preferential and official forum for responsible governments in the Territory concerning their involvement in the formulation of laws and regulations relating to the environmental and social protection regime».

JBNQA, ss. 22.3.1 & 22.3.24; *Environment Quality Act*, R.S.Q. c. Q-2, ss. 134ff.

73. The JBACE is a multi-partite advisory body and not a Cree self-governing institution. Nevertheless, it can presently play a productive role in advancing the environmental and social protection regime in *Eeyou Istchee*.

74. Consistent with our Treaty rights under *JBNQA*, the JBACE should be the entity to carry out consultations concerning *neebee* management in *Eeyou Istchee*. This position is reinforced by the following:

i) JBACE is the «preferential and official forum for responsible governments [including Québec] in the Territory» for the environmental and social protection regime (s. 22.3.24), including such key issues as water management;

ii) the said regime explicitly provides for a «special status and involvement for the Cree people over and above that provided for in procedures involving the general public through consultative or representative mechanisms» (s. 22.2.2 c));

iii) within budgetary limits, JBACE and its members have the power «to call upon other persons for expert advice and assistance» (s. 22.3.22) and, therefore, with proper funding could carry out an effective consultation on water management in *Eeyou Istchee*;

iv) there exists a mandatory obligation, on the part of the Québec government, to consult JBACE from time to time on «major issues respecting the implementation of the regime of the environmental and social protection and land use measures» (s. 22.3.28);

v) BAPE was created under the *Environment Quality Act*, a law of general application, but such laws «apply to the Territory to the extent that they are not inconsistent with the provisions of the [*JBNQA*]» (s. 22.2.3);

vi) BAPE was only established in 1978 (three years after the *JBNQA* was signed) and cannot unilaterally alter the letter and spirit of our Treaty; and

vii) with respect to the Treaties of Aboriginal Peoples, judicial rules of interpretation favour a large and liberal construction of our Treaty rights.

75. Cree involvement in the JBACE does not *per se* constitute a «vital role» in environmental management and development or «effective participation» in achieving sustainable development. However, respecting the consultative role of JBACE would at least be a small step in the direction of recognizing our participatory rights.

> *Rio Declaration on Environment and Development*, Principle 22.

> The rights of [Indigenous Peoples] to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
>
> *Indigenous and Tribal Peoples Convention, 1989*, Art. 15.

76. The JBACE provides an important opportunity for Cree individuals to enhance their experience, training and skills in relation to environment and resource matters pertaining to *Eeyou Istchee*. This opportunity for human resource development is being jeopardized, in view of the severe underfunding of JBACE by the Québec government.

> Governments should commit financial and other resources to education and training for indigenous people and their communities to develop their capacities to achieve their sustainable self-development, and to contribute to and participate in sustainable and equitable development at the national level.
>
> *Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, c. 26 (recognizing and strengthening the role of indigenous people and their communities), para. 26.9.

77. Based on the above, it is clear that the effectiveness of the JBACE as a consultative entity is being unjustly minimized by the Québec government. This is being done by denying JBACE a mandate to consult on water management in *Eeyou Istchee*; denying adequate funding to JBACE so as to effectively carry out the full range of its responsibilities; and violating the spirit and letter of the *JBNQA* Treaty.

78. The James Bay Cree People reiterates its commitment to safeguarding the integrity of the environment and natural resources globally and in *Eeyou Istchee*. For such purposes, we will continue to seek effective partnerships and cooperative arrangements with Québec,

Canada and the international community. Regrettably, while paying lip-service to notions of partnership, the Québec government continues to undermine opportunities for even the most limited forms of environmental cooperation.

> The United Nations Conference on Environment and Development ... [declares] the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people ...
>
> *Rio Declaration on Environment and Development*, *supra* preamble.

IV. ESSENTIAL NATURE OF WATER

79. The essential nature of water for all life on this planet is universally recognized. In *Agenda 21*, the Report of the United Nations Conference on Environment and Development, the far-reaching significance of freshwater resources has been described in the following terms:

> Freshwater resources are an essential component of the Earth's hydrosphere and an indispensable part of all terrestrial ecosystems. (para. 18.1)

80. Lack of care and respect for water resources, as well as mismanagement, can lead to dire consequences both in the short and long term. This is especially a concern in northern environments such as *Eeyou Istchee*.

81. In relation to *neebee* management in *Eeyou Istchee*, the concern of the James Bay Crees is not only for human life but also for the integrity of our environment, its ecosystems and all living things. Our view of water, land and the environment is as an integral and interdependent whole. We are a part of our land, ecosystems and resources. Our identity and spirituality are profoundly shaped by this relationship and world view.

> ...to Aboriginal peoples, land is not just a commodity; it is an inextricable part of Aboriginal identity, deeply rooted in moral and spiritual values. (p. 430)
>
> To Aboriginal peoples, land has a broad meaning, covering the environment, or what ecologists know as the biosphere, the earth’s life-support system.. Land means not just the surface of the land, but the subsurface, as well as the rivers,

lakes (and in winter, ice), shorelines, the marine environment and the air. (p. 448)

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, *supra* vol. 2(2).

82. In order to appreciate the essential nature of water and the crucial role that it plays, one must first understand and recognize the integral and interdependent nature of the environment. This critical notion of «interdependence» is now increasingly being recognized by the international community.

Recognizing the integral and interdependent nature of the Earth, our home ...

Rio Declaration on Environment and Development, preamble.

4.1 Profound significance of water for James Bay Crees

83. In *Eeyou Istchee*, water plays a vital and sustaining role in countless ways: helping to preserve the health of our ecosystems, wildlife and people; providing a habitat and breeding ground for fish and other fauna; regulating climate with its unique properties; serving as travel routes for Cree harvesting and other activities; furnishing us with a water supply for drinking and other purposes; enabling our traditional harvesting practices to continue and flourish; supporting our system of tallymen and traplines; and contributing overall to our culture, identity and spirituality.

84. Water is intricately involved in all aspects of Cree life. Safeguarding the integrity of our northern environment is inseparable from the conservation and management of our water resources. In view of the extensive and complex role of water in *Eeyou Istchee* and the interdependent nature of our environment and resources, it would make little sense for the Québec government to try and separate water rights from Cree Aboriginal, Treaty and other constitutional and human rights.

85. Any governments attempts to separate us from our relationship with water resources and deny us our water rights would be contrary to the laws of nature. It would violate our human rights (heading V *infra*) and the principle of sustainable development (heading VI *infra*). It would add to our dispossession and marginalization and perpetuate a colonized government approach.

> Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.
>
> *Rio Declaration on Environment and Development*, Principle 1.

86. In addition, such government actions would violate Cree law, values and perspectives. Aboriginal perspectives have far-reaching significance in determining the rights and title of Aboriginal Peoples to lands and resources under Canada's Constitution. Therefore, this aspect will be addressed briefly under the sub-heading below.

4.2 Importance of Cree perspective

87. In determining the rights of Aboriginal Peoples to lands and resources, the Supreme Court of Canada has repeatedly highlighted the importance of Aboriginal perspectives. In *Sparrow* v. *The Queen*, Chief Justice Dickson stated:

> ... it is possible, and, indeed, *crucial, to be sensitive* to the aboriginal perspective itself on the meaning of the rights at stake.
>
> *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at p. 1112 [emphasis added].

88. Furthermore, in *R.* v. *Van der Peet*, Chief Justice Lamer emphasized the equal weight that must be given to Aboriginal perspectives:

> ... the only fair and just reconciliation is ... one which takes into account the Aboriginal perspective while at the same time taking into account the perspective of the common law. *True reconciliation will, equally, place weight on each*.
>
> *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 50 [emphasis added]. Similarly, see *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 81 and *R.* v. *Marshall*, [1999] S.C.J. No. 55 , para. 19, online: QL (S.C.C).

89. Land and resources issues concerning Aboriginal Peoples are matters of intersocietal law and not solely federal or Québec law. Therefore, in order to arrive at a fair and just reconciliation, the perspectives of Aboriginal Peoples and non-Aboriginal governments must be equally considered.

90. Consistent with Cree perspectives and principles of democracy and equality, arrangements of sharing should be explored (sub-heading 1.3 *supra*).

V. IMPORTANCE OF HUMAN RIGHTS APPROACH

91. In order to adequately and fairly address water and other resource management issues, it is imperative to adopt a human rights approach. As the United Nations Human Rights Committee has emphasized, such an approach is especially compelling when Indigenous Peoples and our lands and resources are involved.

> The Committee notes that ... the situation of the aboriginal peoples remains 'the most pressing human rights issue facing Canadians'. ... The Committee recommends that decisive and urgent action be taken towards implementation of the [Royal Commission on Aboriginal Peoples] recommendations on land and resource allocation.
>
> United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, 7 April 1999, CCPR/C/79/Add. 105, para. 8.

92. Water management encompasses a number of fundamental aspects that are interrelated and interdependent. These include: environment, development, peace and human rights.

> Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.
>
> *Draft Declaration of Human Rights and the Environment*, Meeting of international group of experts, United Nations, Geneva, 16 May 1994, para. 1

> Peace, development and environmental protection are interdependent and indivisible.
>
> *Rio Declaration on Environment and Development*, Principle 25.

> Social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice ...
>
> *Declaration on Social Progress and Development*, proclaimed by General Assembly resolution 2542 (XXIV), 11 December 1969, Art. 2.

93. Moreover, as evident from the draft *U.N. Declaration on the Rights of Indigenous Peoples* and other international instruments, the fundamental rights of Indigenous Peoples are human rights. Consequently, resource, environment and development questions affecting Indigenous Peoples must be considered in a human rights context.

> ... a ninth category [of human rights], one distinguishably set forth in the Canadian *Charter* - and increasingly recognized in international human rights law - is the category of *aboriginal rights*.
>
> I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 63 at p. 66.

> *...the situation of indigenous people must surely prompt us to ponder more deeply human rights as they are today. Henceforth, we must realize that human rights are not only the rights of individuals. They are also collective rights - historic rights. We are discovering 'new human rights', including first and foremost, cultural rights.*
>
> B. Boutros-Ghali, Statement to U.N. General Assembly, in «Living History: Inauguration of the 'International Year of the World's Indigenous People'», (1993) 3 Transnat'l L. & Contemp. Probs. 168 at p. 170.

94. In view of the dispossession and marginalization faced by Indigenous Peoples, a human rights approach is indispensable in order to both avoid and resolve conflicts.

> The existing and emerging norms and minimum standards contained in the Rio Declaration, the Convention on Biological Diversity, ILO Convention No. 169, the proposed Organization of American States American declaration on the rights of indigenous peoples and the draft United Nations declaration on the rights of

> indigenous peoples should all be seen as *a way to resolve the problems between States and indigenous peoples*. (para. 104)
>
> In addition, the emerging human rights norms relating to the right to development, intergenerational rights, the right to peace and the right to a safe and healthy environment are areas in which indigenous peoples are beginning to influence old thinking and bring about the progressive development of standards that are more sensitive, responsive and useful to indigenous peoples and humankind generally. (para. 105)
>
> U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights of Indigenous Peoples: Indigenous people and their relationship to land*, (E.-I. Daes, Special Rapporteur, Second progress report), *supra* at p. 32 [emphasis added].

95. In addition, considerations of democracy require that human rights be respected. Under the Constitution of Canada, human rights, democracy and the rule of law are interrelated.

> «Democracy within nations requires respect for human rights and fundamental freedoms, as set forth in the [U.N.] Charter.»
>
> B. Boutros-Ghali, *An Agenda for Peace: Report of the Secretary General*, U.N. Doc. A/47/277, 17 June 1992, at p. 22, para. 81.

96. It is essential to note that the United Nations Development Programme (UNDP) has adopted a human rights approach to sustainable human development for all its activities pertaining to development.

> Because UNDP is a development agency, its main contributions to human rights will be through development activities. Thus it is crucial that UNDP develop a human rights approach to sustainable human development programming, thereby ensuring that human rights will be mainstreamed in its activities and not relegated only to specific human rights projects.
>
> United Nations Development Programme, *Integrating human rights with sustainable human development* (New York: UNDP, 1998), at p. 14.

97. The human rights approach taken by the James Bay Crees in this Brief is entirely consistent with UNDP's approach to human rights in environment and development

matters. UNDP confirms the importance of addressing «vulnerability, marginalization and exclusion» in this context.

> *UNDP's approach to human rights is universal and holistic, stressing the indivisibility and interrelatedness of all human rights* - economic, social, cultural, civil and political. Given that UNDP is a development agency, special attention will be paid to economic, social and cultural rights ... and to the human right to development. Special attention will also be paid to ensuring that civil and political rights are fully respected ... UNDP's human rights approach to poverty alleviation will *emphasize empowerment, participation and nondiscrimination and address vulnerability, marginalization and exclusion*.
>
> United Nations Development Programme, *Integrating human rights with sustainable human development*, *supra* at p. 15 [emphasis added].

98. Based on all of the above, a human rights approach must be adopted in formulating any comprehensive and fair policy on water management affecting the James Bay Crees and our environment and resources in *Eeyou Istchee*.

5.1 *James Bay and Northern Québec Agreement* and human rights

99. The *JBNQA* is a sacred Treaty that is intended to enhance cooperation between the James Bay Crees and the federal and Québec governments. Our Treaty is intended to be a «living» and dynamic agreement. It is to be continuously interpreted in a manner that is consistent with contemporary human rights.

100. Yet the Québec government tends to take the view that any rights of the Crees not specifically recognized or affirmed in the Agreement do not exist. This government approach is especially evident, whenever our rights to lands and resources are concerned. Rather than foster mutual trust and respect, this attitude serves to perpetuate our marginalization and dispossession. Equally important, it is incompatible with the obligation to respect our inalienable and inherent human rights.

> *Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law*. Their protection and promotion is the first responsibility of government.
>
> *Charter of Paris for a New Europe, A New Era of Democracy, Peace and*

Unity, November 21, 1990, (1991) 30 I.L.M. 190 [emphasis added].

> Human rights are rights held simply by virtue of being a human person. They are thus *rights that cannot be given or withdrawn at will by any domestic legal system*. And, although they may most effectively be implemented by the domestic legal system, that system is not the source of the right.
>
> R. Higgins, *Problems and Process [:] International Law and How We Use It* (Oxford: Clarendon Press, 1994), at p. 96 [emphasis added].

101. In relation to our land and resource rights, should certain provisions of the *JBNQA* be found to be inconsistent with our human rights, it would be our international human rights that would remain paramount. Federal and provincial governments in Canada cannot avoid their international human rights obligations by adopting conflicting policies or laws.

> ... a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations ...
>
> *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, [1988] I.C.J. 12 at p. 42 (Schwebel J. sep. op.). See also I. Shearer, *Starke's International Law*, 11 ed. (London: Butterworths, 1994), at p. 78.

> Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or laws as an excuse for failure to perform that duty.
>
> *Draft Declaration of Rights and Duties of States*, adopted by the International Law Commission, 1949, Art. 13.

102. Any use of the *JBNQA* that would seek to deny us the exercise of our basic water and other resource rights (include management aspects) would bring dishonour upon the Crown. We urge the Québec government and this Commission to adopt a principled approach that interprets the rights and obligations in *JBNQA* in a manner that is fully respectful of all of our human rights.

> It makes no difference whether the sharp dealings are in the negotiations or drafting of the treaties, or in the implementation of them. The courts have firmly stated that they do not tolerate or condone such conduct by the Crown.

> J.Y. Henderson, *Interpreting Sui Generis Treaties*, (1997) 36 Alta. L. Rev. 46, at p. 80.

5.2 Indivisible and interdependent nature of human rights

103. It is an internationally recognized principle that all human rights and fundamental freedoms are «universal, indivisible, interdependent and interrelated». In the context of management of water and other resources, we must insist upon the fair and equal application of all of our human rights. Such equality and fairness is mandatory under international and domestic law.

> All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, *it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms*.
>
> > United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), (1993) 32 I.L.M. 1661, para. 5 [emphasis added].

> *Reiterating* that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated and should be promoted and implemented in a fair and equitable manner, without prejudice to the implementation of each of those rights and freedoms ...
>
> > *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, U.N.G.A. Res. 53/144, U.N. Doc. A/RES/53/144, 8 March 1999, Annex, 6th preambular para.

104. Within the framework of *neebee* management, it cannot be said that certain of our human rights will be recognized but others will not. This is not an option that is open to the Québec government or to this Commission. For example, failure to recognize and respect

our economic rights to water would seriously affect the full realization of our social, cultural and political rights pertaining to this resource.

> Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development ...
>
> *Proclamation of Teheran*, proclaimed by the International Conference on Human Rights, 13 May 1968, preambular para. 13.

105. The indivisible, interdependent and interrelated nature of our human rights complements and reinforces our perspective of the integrity of the environment and resources of *Eeyou Istchee*. As we have described above, the environment and its resources and ecosystems - of which we are a part - are also integral and interdependent in nature. These complex relationships must be respected and preserved in any new water policy for *Eeyou Istchee*.

106. In order to appreciate the nature of our human rights in this context, particular reference should be made to the draft *United Nations Declaration on the Rights of Indigenous Peoples* and to the *Indigenous and Tribal Peoples Convention, 1989* (No. 169). Although the former international human rights instrument has not yet been adopted by the U.N. General Assembly and the latter one has not yet been ratified by Canada, they are considered as «authoritative statements of norms concerning Indigenous peoples» and the Royal Commission «urge[s] the government of Canada to protect Aboriginal lands and resources in accordance with those norms».

> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, *supra*, vol. 2(2), at p. 568.
>
> The ... Draft Declaration on the Rights of Indigenous Peoples ... stands as an authoritative statement of norms concerning Indigenous peoples on the basis of generally applicable human rights principles, and it also manifests a corresponding consensus among relevant actors. (p. 24)
>
> Convention No. 169 represents a core of expectations that are widely shared internationally and, accordingly, it reflects emergent customary international law generally binding upon the constituent units of the international community. (p. 20)

> S.J. Anaya, "Canada's Fiduciary Obligation Toward Indigenous Peoples in Quebec under International Law in General", in *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec* (Ottawa: Minister of Supply and Services Canada, 1995), vol. 1, International Dimensions, 9.

107. These views are consistent with a recent Supreme Court of Canada ruling. Even where an international convention has not been implemented in Canada and its provisions have therefore no direct application within Canadian law, «international human rights law may help inform the contextual approach to statutory interpretation and judicial review.»

> *Baker* v. *Canada (Minister of Citizenship and Immigration)*, (1999) 174 D.L.R. (4th) 193 (S.C.C.), paras. 69-70.

108. In conclusion, these human rights instruments and norms pertaining to Indigenous Peoples are an integral part of the international human rights framework. They are also directly relevant to the domestic law in Canada. Therefore, they are appropriately referred to below.

> Today many human rights instruments make up the international human rights framework. *Several instruments focus on the rights of specific groups* such as women, children, *indigenous peoples* and the disabled. ... [A] number of declarations deal with social welfare, progress and development, including the 1986 UN Declaration on the Right to Development.
>
> *Together these treaties, conventions and declarations* emphasize not only that human rights are multidimensional (social, economic, cultural and political), but also that they are interrelated and interdependent.
>
> > United Nations Development Programme, *Integrating human rights with sustainable human development*, *supra* at p. 7 [emphasis added].

5.3 Status of James Bay Crees as a «People»

109. The James Bay Crees are a «People» under international and Canadian law. Analysis of the fundamental rights of the James Bay Crees would be severely affected should our status as a «People» be underestimated, misconstrued or ignored.

110. The James Bay Crees have both the objective elements (e.g. common language, history, culture, race or ethnicity, way of life, and territory) and subjective elements (the will to identify and assert its existence as a People) to constitute a «People» for purposes of self-determination under international law.

> Indigenous peoples...in Canada...unquestionably constitute 'peoples' for the purposes of self-determination status.
>
> M. Bryant, «Aboriginal Self-Determination: The Status of Canadian Aboriginal Peoples at International Law», (1992) 56 Sask. L. Rev. 267, at p. 285.
>
> See also M. Seymour, *La Nation en question* (Montreal: Éditions de l'Hexagone, 1999), at p. 155; G. Bertrand, *Plaidoyer pour les citoyens* (Montreal: Les Éditions Balzac, 1996) at p. 40; M.E. Turpel, «The Cultural Non-Homogeneity of Quebec: Secessionism, Indigenous Legal Perspectives and Inseparability» in D. Clark & R. Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996) 284; and Grand Council of the Crees, *Sovereign Injustice [:] Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec*, *supra* at pp. 13-17.

111. As confirmed in the *Indigenous and Tribal Peoples Convention, 1989*, we have the right to self-identification. No one can compel us to identify with them as a single «People». Nor can anyone determine our identity for us. Self-identification is an integral part of our right to self-determination.

> Self-identification as indigenous or tribal shall be regarded as a fundamental criterion ...
>
> *Indigenous and Tribal Peoples Convention, 1989*, Art. 1, para. 2.

> *... indigenous peoples constitute distinct peoples and societies, with the right to self-determination, including the right to autonomy, self-government, and self-identification.*
>
> *Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, United Nations Meeting of Experts, Nuuk, Greenland, 24-28 September 1991, U.N. Doc. E/CN.4/1992/42 and Add.1, preamble.

> ...on parle couramment de nation québécoise. Ce qui est une erreur, sinon une mystification. Si nos concitoyens anglais du Québec ne se sentent pas appartenir à notre nation, si beacoup d'allophones y répugnent, *si les autochtones s'y refusent, puis-je les y englober par la magie du vocabulaire?* L'histoire a façonné une nation française en Amérique; par quelle décision subite pense-t-on la changer en une nation québécoise? *Définir la nation par des frontières territoriales, c'est affirmer que l'État s'identifie à elle; construction toute verbale et parfaitement artificielle de tacticiens politiques*...De tout manière, anglophones et autochtones ne seront pas dupes; ils verront sans peine que nous désirons simplement épouser à notre profit une logique que nous reprouvons lorsqu'elle nous défavorise.
>
> F. Dumont, *Raisons communes* (Montréal: Boréal, 1995) at pp. 63-64.

112. As a People, we possess a distinct legal status under Canadian and international law. Consequently, our role in the context of water management must derive from this status, as well as from our Aboriginal, Treaty and other constitutional and human rights as elaborated in part below.

> It is this fact [i.e. original occupation of North America by Aboriginal peoples], and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their *special legal, and now constitutional, status*.
>
> *R.* v. *Van der Peet*, *supra* para. 30, Chief Justice Lamer, Supreme Court of Canada [emphasis added].

> For purposes of self-determination, Aboriginal peoples should be seen as organic political and cultural entities, not groups of individuals united by racial characteristics.
>
> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, *supra*, vol. 2(1), at p. 176.

5.4 Right of Cree People to self-determination

113. The James Bay Cree People have the right of self-determination.

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, para. 3.

... indigenous peoples have the right to determine their own destiny by choosing their institutions, their political status and that of their territory

> *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples*, Eur. Parl. Doc. PV 58(II) (1994), para. 2.

[The right of self-determination] now applies to all peoples in all territories, not just colonial territories, and to all peoples within a state.

> R. McCorquodale, «Human Rights and Self-Determination» in M. Sellers, ed., *The New World Order [:] Sovereignty, Human Rights, and the Self-Determination of Peoples* (Oxford/Washington, D.C.: Berg, 1996) 9, at p. 9.

114. The right of peoples to self-determination is a human right and is a prerequisite to the enjoyment of all other human rights and freedoms.

... it is certain that self-determination is now a human right in international law.

> R. McCorquodale, «Human Rights and Self-Determination», *supra* at p. 11.

... human rights can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a *human right* and as a *prerequisite for the enjoyment of all the other rights and freedoms*.

> U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980) (H. Gros Espiell, Special Rapporteur) at p. 10, para. 59.

115. The right of self-determination, as provided in the international human rights Covenants, applies equally to Indigenous Peoples as it does to other peoples. In the *Charter of the United Nations*, the Purposes of the United Nations are said to include achievement of «international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction ...»

> *Charter of the United Nations*, Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993, Art. 1, para. 3.

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> *International Covenant on Civil and Political Rights*, Art. 1, para. 1.
>
> *International Covenant on Economic, Social and Cultural Rights*, Art. 1, para. 1.

> Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be *free from any kind of adverse discrimination*, in particular that based on their indigenous origin or identity.
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 2 [emphasis added].

116. The exercise of our right to self-determination in *Eeyou Istchee* includes self-government. In terms of water and other resource management, this would include the right to maintain and strengthen our own institutional structures for this purpose, according to our own traditions and practices.

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*,

para. 33.

117. In the International human rights Covenants, states have an affirmative obligation to promote and respect the right of self-determination. In view of the importance of this fundamental right, its contents will be examined briefly under the following two sub-headings.

> The States Parties to the present Covenant ... shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.
>
> *International Covenant on Civil and Political Rights*, Art. 1, para. 3.
>
> *International Covenant on Economic, Social and Cultural Rights*, Art. 1, para. 3.

5.5 Right to enjoy and utilize natural wealth and resources

118. The right to self-determination includes the right to use and benefit from natural wealth and resources.

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.
>
> *International Covenant on Civil and Political Rights*, Art. 1, para. 2.
>
> *International Covenant on Economic, Social and Cultural Rights*, Art. 1, para. 2.

119. This principle in Article 1 is highly important and elemental to the basic meaning of virtually all other human rights. It is stated again in both Covenants as an «inherent» right of all Peoples.

> Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

> *International Covenant on Civil and Political Rights*, Art. 47
>
> *International Covenant on Economic, Social and Cultural Rights*, Art. 25.

120. Yet it is this aspect of the right of self-determination - relating to natural wealth and resources - that non-Indigenous governments most frequently seek to deny to Indigenous Peoples. As a consequence of such denials and dispossessions, Indigenous Peoples have historically been rendered dependent on these governments, contrary to our right of self-determination.

121. The United Nations Human Rights Committee has explicitly concluded that the right to self-determination of Aboriginal Peoples in Canada includes the right to enjoyment of our natural wealth and resources. In addition, the Committee underlined that we must not be deprived of our means of subsistence.

> ... the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.
>
> United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, 7 April 1999, *supra*, para. 8.

122. In order to break the cycle of dependency, an alternative and constructive approach would be for governments to negotiate new arrangements with Indigenous Peoples based on the principle of sharing. This would underscore the reality that paragraph 2 of Article 1 applies to «Peoples» and that natural resources are not the sole interest of governments.

> This paragraph, however, is not merely a reaffirmation of the right of every state over its own natural resources; it *clearly provides that the right over natural wealth belongs to peoples*.
>
> A. Cassese, "The Self-Determination of Peoples" in L. Henkin (ed.), *The International Bill of Rights [:] The Covenant on Civil and Political Rights*, (New York: Columbia University Press, 1981) 92 at p. 103 [emphasis added].

123. The right to enjoy and utilize the natural wealth and resources embodies the source of

subsistence and life itself. The content of this right is further elaborated in the final sentence in paragraph 2 of Article 1, «[i]n no case may a people be deprived of its own means of subsistence». We examine this aspect below.

5.6 Right to own means of subsistence

124. As mentioned, the obligation not to deprive a People of its own means of subsistence is stated in the two international human rights Covenants.

> In no case may a people be deprived of its own means of subsistence. (Art. 1, para. 2)

125. The words «in no case...» imply that the prohibition is absolute. We may not be denied the wherewithal for life itself—food, shelter, clothing, land, water, and the freedom to pursue a way of life. There are no exceptions to this rule. If a People were to enter into an agreement that deprived it of its means of subsistence, then that arrangement would be nullified.

> It may be read to nullify even arrangements 'freely made' by the people 'for their own ends' if these arrangements deprive the people of its own means of subsistence.
>
> A. Cassese, "The Self-Determination of Peoples" in L. Henkin (ed.), *The International Bill of Rights [:] The Covenant on Civil and Political Rights*, 92 *supra* at p. 106.

126. As Grand Chief Ted Moses explains:

> We have the right to benefit from the resources of the land as an expression of our right of self-determination. We may not be denied a means of subsistence; moreover, we may not be denied our *own* means of subsistence. We have the right to use our lands and waters to live by our own means as we always have, and by whatever means we deem necessary to address contemporary challenges. Self-determination protects our right to subsist, and it protects as well our right to subsist based on our own values and perspectives.
>
> T. Moses, «Self-Determination and the Survival of Indigenous Peoples: The Crucial Significance of this International Human Right», presentation at the Midnight Sun Workshop, 17-20 June 1999, Inari, Finland

(publication forthcoming).

127. Subsistence for Indigenous Peoples has vital economic, social, cultural, spiritual and political dimensions. This is consistent with the profound relationship we have with our lands, resources and environment.

128. As a consequence of its unique significance for Indigenous Peoples, subsistence is explicitly framed in terms of a «right». This reinforces its relevance and applicability to the Peoples concerned.

> Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 21.

5.7 Right to own institutions

129. The right of Indigenous Peoples to own, develop, control and use the lands, waters and other resources in our traditional territories, «includes the right to the full recognition of [our] laws, traditions and customs, land-tenure systems and *institutions* for the development and management of resources.»

> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 26 [emphasis added].

130. The maintenance and strengthening of institutions of Indigenous Peoples is linked to the degree of control we have over developments affecting us and our lands.

> ... control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs ...
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, 8th

preambular para.

> Many indigenous social institutions, *including those important for resource management*, have been weakened over the years. Successful co-management requires empowerment of Native communities to help strengthen these institutions ... In such areas, resource co-management will become an essential and major component of self-government.
>
> F. Berkes & H. Fast, «Aboriginal Peoples: The Basis for Policy-Making toward Sustainable Development», *supra* at p. 255 [emphasis added].

131. In light of the dispossession, marginalization and colonization suffered by Indigenous Peoples worldwide, it is a responsibility of non-Indigenous governments to now establish the means for the full development of Indigenous Peoples' institutions. This includes providing the necessary resources. Under the *Indigenous and Tribal Peoples Convention, 1989*, these obligations are mandatory and they apply as well to institutions relating to natural resources and the environment.

> In applying the provisions of this Convention, governments shall: ... (c) establish means for the *full development of these peoples' own institutions* and initiatives, and in appropriate cases *provide the resources necessary* for this purpose.
>
> *Indigenous and Tribal Peoples Convention, 1989*, Art. 6, para. 1(c) [emphasis added].

132. Moreover, the Convention stipulates that «the integrity of the values, practices and institutions» of [Indigenous and Tribal] peoples shall be respected».

> *Indigenous and Tribal Peoples Convention, 1989*, Art. 5, para. (b); see also Art. 2, para. 2(b).

133. As described in this Brief, the right to our own institutions is a critical part of our right to self-determination, right to resources and their management, and right to development (sub-heading 5.10 *infra*).

5.8 Right to equality and non-discrimination

134. In Canada, equality rights and the prohibition against discrimination is enshrined in both the *Canadian Charter of Rights and Freedoms* (s. 15) and the Québec *Charter of Human Rights and Freedoms* (s. 10). In addition, there exist numerous international instruments addressing the issues of equality and non-discrimination. A major treaty on this important subject is the *International Convention on the Elimination of All Forms of Racial Discrimination*.

135. The principles of equality and nondiscrimination are not only found in authoritative human rights instruments, but are also «now widely acknowledged as forming part of customary international law».

> B.G. Ramcharan, «Equality and Nondiscrimination» in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 246, at p. 249.

136. In view of the pervasive discrimination suffered by Indigenous Peoples, international instruments now explicitly prohibit discrimination against such Peoples.

> Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.
>
> *Indigenous and Tribal Peoples Convention, 1989*, Art. 3, para. 1.

> Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. (Art. 1)
>
> Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity. (Art. 2)
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*

137. In conformance with the right to equality and non-discrimination, states are prohibited from denying us our status as «Peoples» in order to deny us our right to self-determination.

> ... the term '*discrimination*' as used in the Covenant [on Civil and Political Rights] should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race*, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and *which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*.
>
> Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), at para. 7 [emphasis added].

Similarly, see *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 10.

5.9 Right to be different

138. Indigenous Peoples have the right to be different and to be respected as such.

> ... indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such ...
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, first preambular para.

139. The right to be different necessarily complements the right to equality and non-discrimination. It makes clear that, in order to achieve equality, it may often be necessary to treat Indigenous Peoples differently. However, this difference cannot serve as a pretext for racial discrimination.

> «All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. However, *the diversity of life styles and the right to be different may not, in any circumstances, serve as a pretext for racial prejudice; they may not justify either in law or in fact any discriminatory practice whatsoever*, nor provide a ground for the policy of apartheid, which is the extreme form of racism» [emphasis added].
>
> *Declaration on Race and Racial Prejudice*, Art. 1, para. 2 [emphasis

added].

Equality has both a negative aspect (non-discrimination) and a positive aspect (special measures of protection). 'Equality in law' no longer means purely formal or absolute equality, but relative equality, which often requires differential treatment.

W. McKean, *Equality and Discrimination Under International Law* (Oxford: Clarendon Press, 1983) at p. 51.

140. In relation to the management of water and other resources, the right of Indigenous Peoples to be different reinforces such basic human rights as our right of self-determination, right to our own institutions and right to development. In this and other contexts, the ongoing development of our culture is both our right and responsibility.

1. Each culture has a dignity and value that must be respected and preserved.

2. Every people has the right and the duty to develop its culture.

3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage of [hu]mankind.

Declaration of Principles of International Cultural Cooperation, proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization, fourteenth session, 4 November 1966, Art. 1.

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 8.

5.10 Right to territorial security

141. The principle of territorial security is intimately linked to the distinct legal status of Indigenous Peoples as «Peoples» under international law. The Chairperson/Rapporteur of the United Nations Working Group on Indigenous Populations, Dr. E.-I. Daes, describes this key principle as follows:

> A corollary of legal personality is the principle of territorial security. This means that indigenous peoples have defined historical territories physically intact, environmentally sound and economically sustainable in their own ways.
>
> E.-I. Daes, «Equality of Indigenous Peoples Under the Auspices of the United Nations - Draft Declaration on the Rights of Indigenous Peoples» (1995) 7 St. Thomas L. Rev. 493, at p. 497.

142. As Dr. Daes points out (p. 497), the principle of territorial security is expressly included in Part VI of the draft *United Nations Declaration on the Rights of Indigenous Peoples*.

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 26.

143. As evident from the Draft U.N. Declaration, the principle of territorial security is expressed in terms of our resource, management and development rights. All of these specific rights are indivisible and interdependent and linked to our right of self-determination.

5.11 Right to an adequate land and resource base

144. The right to an adequate land and resource base is not only crucial to the survival and ongoing development of Indigenous Peoples. It is also essential for the exercise of our right to self-determination and self-government.

> *Indigenous territory and the resources it contains are essential to the physical, cultural and spiritual existence of indigenous peoples and to the construction and effective exercise of indigenous autonomy and self-government. This territorial and resource base must be guaranteed to these peoples for their subsistence and the ongoing development of indigenous societies and cultures …*
>
> *Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, United Nations Meeting of Experts, Nuuk, Greenland, 24-28 September 1991, *supra*, at para. 4 [emphasis added].
>
> See also *N. Rouland, Les Inuit du Nouveau-Québec et la Convention de la Baie James (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at pp. 5-6.*

> ... self-government consisting merely of local powers would not suffice. It would also have to include some degree of control over lands and resources used by [the Aboriginal Peoples concerned].
>
> F. Berkes & H. Fast, «Aboriginal Peoples: The Basis for Policy-Making toward Sustainable Development», *supra*, at p. 256.

145. The critical importance of ensuring an adequate land and resource base is underlined by the Royal Commission on Aboriginal Peoples (RCAP). Without such a territorial base, «economic, cultural and political extinction» become highly possible.

> Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a *greater share of the lands and resources* in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently, on the margins of Canadian society, they will be *pushed to the edge of economic, cultural and political extinction*.
>
> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, *supra*, vol. 2(2), at p. 557 [emphasis added].

> Indigenous peoples are aware of the fact that unless they are able to retain control over their land and territories, *their survival as identifiable, distinct societies and cultures is seriously endangered*.
>
> R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* (Tokyo: United Nations University Press, 1990), at p. 105 [emphasis added].

146. The U.N. Human Rights Committee has wholly endorsed RCAP's recommendations that an adequate land and resource base is crucial for the exercise of self-government. Moreover, the Committee has emphasized the urgency of the situation in Canada.

> With reference to the conclusion by RCAP that *without a greater share of lands and resources institutions of aboriginal self-government will fail*, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence. The Committee recommends that *decisive and urgent action be taken towards implementation of the RCAP recommendations on land and resource allocation*.
>
> United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, 7 April 1999, *supra*, para. 8 [emphasis added].

147. The awareness of this precarious situation by non-Indigenous governments and the continuance of their policies of dispossession constitute a recognized form of cultural genocide.

> Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
>
> a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; ...
>
> (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures ...

> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 7.

> ...it is no longer possible for us to allow a single ethnocide to take place. Let us pledge that we will be more vigilant in this respect than we have been thus far; let us organize an alliance; *let us sound the alarm as soon as a civilization, a language, or a culture is in danger. This commitment...should be one for the entire international community...*
>
> B. Boutros-Ghali, Statement to U.N. General Assembly, in *Living History [:] Inauguration of the "International Year of the World's Indigenous People"*, (1993) 3 Transnat'l L. & Contemp. Probs. 168 at p. 170 [emphasis added].

148. An adequate land and resource base is vital for a number of additional purposes. It provides a foundation for reconciliation, a new relationship, equitable sharing and peaceful co-existence. As history has amply demonstrated, the denial of a sufficient land and resource base is a prescription for perpetual distrust and conflict.

> Expanding the Aboriginal land and resource base is not just about honouring past obligations ... It is about laying a firm consensual foundation for *a new relationship* between Aboriginal and non-Aboriginal Canadians, one of *fair sharing* of Canada's enormous land mass, of *mutual reconciliation* and of *peaceful co-existence*. Without it there can be no workable system of Aboriginal self-government. There can only be a continual clash of cultures and interests.
>
> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, *supra*, vol. 2(2) at p. 430 [emphasis added].

149. Furthermore, the denial of Indigenous Peoples' right to an adequate land and resource base is incompatible with the fiduciary relationship and duty that state governments have with the Peoples concerned. In land and resource negotiations, all governments involved have an affirmative duty to act in the interests of Indigenous Peoples and not against them.

> The fact that the relationship between the government and Aboriginal peoples is trust-like, rather than adversarial has important implications for the role of government with respect to Aboriginal land and resources. It requires institutional

arrangements to protect them, and it requires government not to rely simply on the 'public interest' as justification for limiting the exercise of Aboriginal rights with respect to them. Moreover, it requires government to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources.

> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, *supra*, vol. 2(2) at p. 566.

... the notion of fiduciary duties has been introduced, among other things, to police the [Aboriginal/Crown] relationship and to ensure that the conduct of the Crown conforms to a standard of fairness and honour...Fiduciary obligations have been articulated in the jurisprudence on aboriginal and treaty rights precisely because the Crown has a special legal and constitutional duty not to affect First Nations adversely.

> M.E. Turpel, *A Fair, Expeditious, and Fully Accountable Land Claims Process*, [1995] 2 Indian Claims Commission Proc. (Special Issue on Land Claims Reform) 61 at p. 84.

5.12 Right to development

150. As stated in the *Declaration on the Right to Development*, the right to development is inalienable:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
>
> *Declaration on the Right to Development*, adopted by General Assembly resolution 41/128, 4 December 1986, Art. 1, para. 1.

151. The right to development is interdependent with and interrelated to other human rights.

> All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the

context of the whole.

Declaration on the Right to Development, Art. 9, para. 1.

The right of development as a human right is the synthesis of all human rights ... All human rights are interdependent and each one conditions the remaining.

H. Gros Espiell, «The Right of Development as a Human Right», (1981) 16 Texas Int'l L. J. 189 at p. 205.

... while it may not be entirely accurate to describe the right to development as a new human right, it has clearly added a new dimension to human rights law.

R. Rich, «The Right to Development as an Emerging Human Right», (1983) 23 Virginia J. of Int'l L. 287 at 325.

152. In particular, when there are resource, environment and development issues affecting Indigenous Peoples, the human right to development must be respected.

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Rio Declaration on Environment and Development, Principle 3.

153. The right to development is also inextricably linked to the right of Indigenous Peoples to self-determination, including the use, enjoyment and control of natural resources.

The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Declaration on the Right to Development, Art. 1, para. 2.

The mere formulation of a State does not in itself fully realize the right to self-determination, unless its citizens and constituent peoples continue to enjoy the

right to their own cultural identity and to determine their own economic, social and political system through democratic institutions and actions ...

> U.N. Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, *supra*, para. 151.

154. The United Nations Development Programme has confirmed that the right to development, as elaborated in the *Declaration on the Right to Development*, includes the right of participation, right to fair sharing of the benefits, right to non-discrimination and right to self-determination (including natural resource rights).

> ... there is no doubt that the right to development is not a mere pipe dream or ideological slogan. It is a human right guaranteed by international law. ...
>
> Most human rights have several components or related rights. The component rights of the human right to development include:
>
> * Rights of participation. Every person and all peoples are entitled to 'active, free and meaningful participation in development' (Preamble) and, as an 'active participant' (Article 2), to 'contribute to and enjoy economic, social, cultural and political development' (Article 1(1)).
>
> * The right to 'fair distribution' (Preamble) of the benefits from development.
>
> * The right to nondiscrimination in development 'without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (Preamble).
>
> * The right to self-determination. 'The human right to development also implies the full realization of the right of peoples to self-determination, which includes . . . their inalienable right to full sovereignty over all their natural wealth and resources' (Article 1(2)).
>
> United Nations Development Programme, *Integrating human rights with sustainable human development*, *supra* at pp. 21-22.

The right to development ... includes the right to effective participation in all aspects of development and at all stages of the decision-making process; the right

> to equal opportunity and access to resources; the right to fair distribution of the benefits of development; the right to respect for civil, political, economic, social and cultural rights ...
>
> U.N. Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, *supra*, para. 143.

155. The *James Bay and Northern Québec Agreement* expressly refers to the «right to develop» in relation to the Cree environmental and social protection regime for *Eeyou Istchee*. In this context, the right to develop is referred to as a «guiding principle». This reinforces our position that the *JBNQA* must be interpreted in a manner consistent with contemporary interpretations of international human rights law, including the right to development. This has potentially far-reaching positive implications in terms of recognition of the Cree right to self-determination.

> The said [environmental and protection] regime provides for: ...
>
> f) The right to develop in the Territory. (s. 22.2.2 f))
>
> The responsible governments and the agencies created in virtue of this Section [Environment and Future Development] shall within the limits of their respective jurisdictions or functions as the case may be give due consideration to the following guiding principles: ...
>
> h) The right to develop by persons acting lawfully in the Territory. (s. 22.2.4 h))
>
> Recognition of the right to development and human rights in the national legal system is not sufficient in itself. States must also ensure the means for the exercise and enjoyment of these rights on a basis of equal opportunity.
>
> U.N. Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, *supra*, para. 146.

VI. SUSTAINABLE DEVELOPMENT AND THE JAMES BAY CREES

156. In Québec's public consultation document, it is said that:

> The government's strategy is part of a perspective aimed at achieving sustainable development. It is indeed vitally important for the well-being of future generations that we should leave behind a good quality environment and resources able to sustain their development.
>
> Ministère de l'Environnement, *Water Management in Québec: Public Consultation Document*, *supra* at p. 9.

157. The World Commission on Environment and Development defines «sustainable development» as follows:

> Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
>
> i) the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given; and
>
> ii) the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.
>
> World Commission on Environment and Development, *Our Common Future*, *supra* at p. 43.

158. While the James Bay Cree Nation endorses the principle of sustainable development, it is clear that government strategies or actions to marginalize Indigenous Peoples are wholly inconsistent with this important precept.

> ... marginalization is a symptom of a style of development that tends to neglect both human and environmental considerations. Hence a more careful and sensitive consideration of [Indigenous Peoples'] interests is a touchstone of a sustainable development policy.

> World Commission on Environment and Development, *Our Common Future*, *supra* at p. 116.

159. With regard to Indigenous Peoples, equitable considerations are clearly an integral part of sustainable development policy.

> Even the narrow notion of physical sustainability implies a concern for social *equity between generations*, a concern that must logically be extended to equity *within each generation*.
>
> > World Commission on Environment and Development, *Our Common Future*, *supra* at p. 43 [emphasis added].

160. This element of fairness has been described elsewhere in different ways. For example, the *Indigenous and Tribal Peoples Convention, 1989* refers to «the importance of sustainable and equitable development» (art. 23, para. 2).

161. In addition, in the now-defunct Charlottetown Constitutional Accord, federal, provincial and territorial governments in Canada unanimously agreed with Aboriginal leaders that a policy objective of the economic union would include «ensuring sustainable and equitable development».

> See Draft Legal Text, October 9, 1992, s. 36.1(3)(e), reproduced in K. McRoberts & P. Monahan, (eds.), *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: Univ. of Toronto Press, 1993), at p. 356.

162. Further, at the United Nations Conference on Environment and Development in Brazil in 1992, the government of Canada adopted the following definition of sustainable development:

> For aboriginal peoples in Canada, sustainable development means planned development that is within the carrying capacities of affected ecosystems, that safeguards the cultures of aboriginal peoples, and respects their rights, values and priorities. It must also be equitable, meaning that it must achieve an adequate measure of social justice through direct participation of aboriginal peoples in all stages of the planning process, including social and environmental impact assessment and monitoring, and ensure that the benefits accrue to these people in

a manner acceptable to them.

> Canada, *Canada's National Report: United Nations Conference on Environment and Development, Brazil June 1992* (Ottawa: Government of Canada, 1991) at p. 120.

163. In *Agenda 21: Report of the United Nations Conference on Environment and Development,* the link between sustainable development and the role of Indigenous Peoples and our communities is emphasized:

> In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.
>
> *Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, A/CONF.151/26 (vol. III), c. 26, para. 26.1. See also para. 26.9, where, in relation to indigenous peoples, reference is made to «sustainable and equitable development».

164. In addition, in connection with the role and responsibilities of the Arctic Council, all of the Arctic States (including Canada) have included in the principle of sustainable development a wide range of economic, social and cultural considerations.

> *Affirming* our commitment to sustainable development in the Arctic region, including economic and social development, improved health conditions and cultural well-being ...
>
> *Declaration on the Establishment of the Arctic Council*, (1996) 35 I.L.M. 1387, 2nd preambular para.

165. The United Nations Development Programme has adopted a human rights approach to sustainable human development and has linked it to Indigenous Peoples' right to self-determination and control of our «ancestral lands».

> Developing UNDP's human rights approach to sustainable human development will be a dynamic process ...The process will inevitably focus on the rights most frequently encountered in UNDP's sustainable human development activities,

including: ...

* Rights of minorities and indigenous peoples. Among them, rights to maintain languages and cultures and *rights of distinct peoples living in distinct regions to self-determined development and control of ancestral lands*, which are often the basis of community organization, culture and ways of life.

United Nations Development Programme, *Integrating human rights with sustainable human development*, *supra* at pp. 15-16.

166. In regard to sustainable development, the Committee on the Elimination of Racial Discrimination has tied this principle to cultural considerations concerning Indigenous Peoples. This Committee examines the reports of State parties under article 9 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

> The Committee calls in particular upon State parties to: ... c. provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics ...
>
> Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, para. 4c (adopted at the Committee's 1235th meeting on 18 August 1997).

167. In *Eeyou Istchee* and other territories of Indigenous Peoples, the multi-dimensional characteristics and objectives of sustainable development include more than ecological sustainability. They also include economic and socio-cultural sustainability.

> As it is coming to be interpreted in Canada, sustainable development involves more than ecological sustainability; it also includes economic and socio-cultural sustainability. Thus sustainable development planning for the North involves multiple objectives, including those pertaining to economic development, the land and resource base, and environment-culture relationships ...
>
> F. Berkes & H. Fast, «Aboriginal Peoples: The Basis for Policy-Making toward Sustainable Development», *supra* at p. 205.

168. In particular, in respect to management of water and other resources in *Eeyou Istchee*, culturally sustainable planning development is essential.

> Sustainable development in the bioregion needs to take into account indigenous cultures, which remain different and distinct from the dominant Euro-Canadian culture. To be culturally sustainable, development should reinforce cultural values such as self-reliance, cooperation, sharing, reciprocity, and respect. *As the indigenous concept of respect applies equally well to people and nature, cultural sustainability reinforces ecological sustainability*.
>
> F. Berkes & H. Fast, «Aboriginal Peoples: The Basis for Policy-Making toward Sustainable Development», *supra* at p. 254 [emphasis added].

169. Based on all of the above, a sustainable development policy relating to water management in *Eeyou Istchee* must be equitable with regard to Indigenous Peoples. Such a policy must also be compatible with, and sensitive to, our values, cultures, economies, rights and interests. Further, consistent with our rights to self-determination and to development, it must recognize and strengthen the regulatory and participatory role of the James Bay Crees and our own institutions and communities.

VII. PRINCIPLE OF CREE CONSENT

7.1 Duty to consult and negotiate and principle of Cree consent

170. In matters relating to resource exploitation and development, the Québec and federal governments have most often demonstrated little regard for Indigenous Peoples and our territorial rights. For example, the James Bay I hydroelectric project (La Grande Complex) was announced publicly in 1971 by the Québec government without our knowledge or consent.

171. Since the adoption of the *Constitution Act, 1982*, the Supreme Court of Canada has ruled that s. 35(1) concerning the protection of Aboriginal and Treaty rights provides a solid constitutional base for negotiations. In this context, the Crown «is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith».

> *Delgamuukw* v. *British Columbia*, *supra*, para. 186.

172. In light of the Aboriginal and Treaty rights of Aboriginal Peoples, there is a duty to consult and negotiate in good faith.

> Where a national park is established, the impact will occur on title, the rights and the use of the land. There is, therefore, *a duty to consult and negotiate in good faith* [with Aboriginal peoples who claim rights] in such circumstances.
>
> > *Nunavik Inuit* v. *Canada (Minister of Canadian Heritage)*, [1998] 4 C.N.L.R. 68 (F.C.T.D.), at 99, and at pp. 101-102.

> [Ontario 'workfare'] legislation ought not to be enacted without meaningful consultation and negotiation, and the concurrence of the [Aboriginal] applicants ...
>
> > *Mushkegowuk Council* v. *Ontario*, [1999] O.J. No. 3170, online: QL (Ont. Sup. Ct.), para. 18.

173. However, the basis of a constitutional duty of governments to negotiate with Aboriginal peoples is not limited to s. 35(1) of the *Constitution Act, 1982*. In *Reference re Secession of Québec*, the Supreme Court of Canada indicates generally that there are underlying «constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities» (para. 90). These constitutional principles are not limited to secession issues and would apply to our resource rights.

> G. Tremblay, *Le procédure implicite de modification de la Constitution du Canada pour le cas de la sécession du Québec*, (1998) 58 R. du B. 423, at p. 425 (re constitutional principles as a source of the duty to negotiate).

174. In addition, the right of Aboriginal Peoples to self-determination includes the right to initiate changes in governmental arrangements. In this context, Québec and other governments in Canada have the duty to negotiate in good faith.

> *The right to self-determination gives Aboriginal peoples the right to initiate changes in their governmental arrangements* within Canada and to implement such reforms by negotiations and agreements with other Canadian governments, which have the *duty to negotiate in good faith* and in light of fiduciary obligations owed by the Crown to Aboriginal peoples.
>
> > Royal Commission on Aboriginal Peoples, *Report of the Royal*

> *Commission on Aboriginal Peoples*, *supra*, vol. 2(1), at p. 172 [emphasis added].

175. In regard to the proposed use, development or exploitation of water and other resources in the traditional territories of Indigenous Peoples, states and their governments must first obtain our free and informed consent. This obligation flows from our right of self-determination. It also is a consequence of our rights to, and control over, the resources concerned. Moreover, the principle of Indigenous consent is wholly consistent with the principle of sustainable development.

> ...indigenous peoples...have the right to self-determination, and...the existing State has a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically.
>
> E.-I. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, (1993) 3 Transnat'l L. & Contemp. Probs. 1, at p. 9.

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their *free and informed consent* prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 30 [emphasis added].

> The [Indigenous and Tribal] peoples concerned shall have the *right to decide their own priorities for the process of development* as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
>
> *Indigenous and Tribal Peoples Convention, 1989*, Art. 7 [emphasis added].

176. In addition, it is a constitutional requirement that Cree treaty rights under *JBNQA* not be

amended without Cree consent. Every chapter of *JBNQA* is subject to a general consent provision, or else includes a specific requirement for Cree consent to any amendment or modification.

JBNQA, ss. 2.15 (general consent provision); 3.7; 5.6; 6.6; 7.5; 8.19; 9.0.4; 10.0.19; 11A.0.9; 11B.0.18; 12.0.3; 13.0.3.; 14.0.29; 15.0.27; 16.0.38; 17.0.88; 18.0.38; 19.4; 20.0.27; 21.0.20; 22.7.10; 23.7.10; 24.15.1; 26.0.10; 27.0.10; 28.18.1; 29.0.44.

177. It has sometimes been suggested that, in some instances, there may only be a need for «consultation». The problems generally experienced by Indigenous Peoples when non-Indigenous governments carry out consultations is recognized in the *Indigenous and Tribal Peoples Convention, 1989*. Therefore, the Convention stipulates three mandatory conditions as follows that are geared towards obtaining consent:

> The consultations carried out in application of this Convention shall be undertaken, in *good faith* and in a *form appropriate to the circumstances*, with the *objective of achieving agreement or consent* to the proposed measures.
>
> *Indigenous and Tribal Peoples Convention, 1989*, Art. 6, para. 2 [emphasis added].

178. However, where special measures are required to safeguard the environment, cultures and other matters affecting Indigenous Peoples, the Convention explicitly requires Indigenous Peoples' consent.

> 1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
>
> 2. Such special measures *shall not be contrary to the freely-expressed wishes* of the peoples concerned.
>
> *Indigenous and Tribal Peoples Convention, 1989*, Art. 4, paras. 1 & 2 [emphasis added].

179. In regard to decisions concerning resource use and management, the World Commission on Environment and Development has concluded that recognition of resource rights and a «decisive voice» must be ensured for Indigenous Peoples:

> The starting point for a just and humane policy for such groups is the recognition

> and protection of their traditional rights to land and the other resources that sustain their way of life - rights they may define in terms that do not fit into standard legal systems. These *groups' own institutions are crucial* for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect local institutions that enforce responsibility in resource use. And this recognition must also give local communities *a decisive voice in the decisions about resource use* in their area.
>
> World Commission on Environment and Development, *Our Common Future*, *supra* at pp. 115-116 [emphasis added].

180. In *Delgamuukw*, the Supreme Court of Canada has indicated that a mere duty to consult is generally reserved for cases where there are potentially minor breaches of rights. However, «even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue.» The Court adds:

> In most cases, it will be significantly deeper than consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.
>
> *Delgamuukw* v. *British Columbia*, *supra*, para. 168.

7.2 Hydro-Québec policy on community consent

181. In Hydro-Québec's *Strategic Plan 2000-2004*, it is declared that there are «three conditions for undertaking projects:

- They must be profitable under current market conditions ...
- They must be environmentally acceptable, in accordance with the principles of sustainable development.
- They must be well received by local communities.»

> Hydro-Québec, *Strategic Plan 2000-2004: Serving Our Customers Better* (Montreal: 1999), pp. 8 & 40.

182. Consistent with the principles of sustainable development (heading VI *supra*), any hydroelectric project proposed by Hydro-Québec in *Eeyou Istchee* must be compatible with, and sensitive to, the values, rights and interests of the James Bay Cree People. This means that it is the values, rights and interests of our People as a whole that must be respected and not solely those of any single Cree community concerned.

183. It is not sufficient for Hydro-Québec to state that its proposed projects «must be well received by local communities». To a significant degree, this latter condition formally recognizes the essential principle of Cree consent. However, it is not an appropriate role for Hydro-Québec to determine who within the Cree Nation should provide any possible Cree approval.

184. For Hydro-Québec to purport to single out local Cree communities for approval could prove to be divisive in terms of the Cree Nation. Consent to proposed hydroelectric projects is a matter for the Cree People unitedly to reflect upon and decide.

185. The real and potential impacts of hydroelectric projects generally affect vast areas of *Eeyou Istchee*. Consequently, it makes little sense for Hydro-Québec to characterize future approvals simply in terms of «local communities». Clearly, the consent of the James Bay Cree Nation would include the voices of local communities. However, there exist collective rights and interests that extend beyond any particular community. Consistent with our right to self-determination, it is the James Bay Cree People that must collectively decide.

VIII. QUÉBEC GOVERNMENT STRATEGIES - MARGINALIZING THE CREES

186. As demonstrated throughout this Brief, the James Bay Cree Nation possesses a broad range of rights and interests in relation to *neebee* and *neebee* management. Yet the Québec government continuously engages in numerous strategies that serve to marginalize or even exclude us as a People. As described below, these strategies depict a history of systematic and ongoing human rights violations. In many instances, these government actions encompass nothing less than racial discrimination.

187. For example, in Québec's Public Consultation Document on water management, the

«main players» in water management are highlighted. No reference whatsoever is made to the James Bay Crees and other Aboriginal peoples or to our respective governments. This exclusion runs counter to existing and emerging human rights standards relating specifically to Indigenous Peoples. It also goes against the spirit and letter of the *James Bay and Northern Québec Agreement*.

> Ministère de l'Environnement, *Water Management in Québec: Public Consultation Document*, *supra*, Appendix 3, p. 63.

> The [environmental and social protection] regime provides for: ...
>
> c) A special status and involvement for the Cree people over and above that provided for in procedures involving the general public through consultation or representative mechanisms ...
>
> *JBNQA*, s. 22.2.2 c).

188. The World Commission on Environment and Development has described the far-reaching impacts of excluding and marginalizing Indigenous Peoples in the following terms:

> Social discrimination, cultural barriers, and the exclusion of [indigenous] people from national political processes makes these groups vulnerable and subject to exploitation. Many groups disappear. They become the victims of what could be described as cultural extinction.
>
> World Commission on Environment and Development, *Our Common Future*, *supra* at p. 114.

189. It is increasingly recognized internationally that, although non-Indigenous governments have entered into sacred Treaties with Indigenous Peoples, these Treaties are «shamelessly» violated by these governments. Treaty violations by the Québec and federal governments is a serious and recurring problem faced by the James Bay Crees. However, it is clear that the Aboriginal and Treaty rights serve to constitutionally limit any claims of sovereignty or immunity by either government.

> ... certain states have concluded treaties with indigenous peoples in the past and ...some of these treaties have been shamelessly violated; ... in this connection, in the context of increasing impoverishment, *indigenous peoples are often the first to be dispossessed of rights, land and resources*.

> *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples* (European Parliament), Eur. Parl. Doc. PV 58(II) (1994), preambular para. F [emphasis added].

> *Lord et al.* v. *Canada (A.G.)*, No. 500-05-043203-981, Québec Superior Court, judgement rendered by the Croteau J., 24 November 1999, at p. 42.

190. Since this Commission on Water Management is a provincially-constituted body, we will focus below on the strategies and actions of the Québec government that serve to marginalize or exclude the James Bay Crees.

8.1 Québec's Aboriginal policy driven by sovereignty agenda

191. To a large degree, the policies and strategies of the Québec government concerning the James Bay Crees and other Aboriginal Peoples are dictated by its political agenda towards Québec sovereignty. Our human rights, as elaborated in this Brief, are accorded little or no consideration. Aboriginal peoples' status and rights are recognized solely in a manner that may not «impede» the government's secessionist aspirations.

192. The government's «obsession» to produce winning conditions for another referendum on Québec sovereignty is the target of severe criticism by commentators in the province. This overriding strategy continues to undermine relations and progress on basic Cree rights and concerns.

> A. Dubuc, «L'*Annus horribilis*», *La Presse* (27 November 1999) B2.

193. Clear evidence of this strategy is found in Québec's latest policy document on Aboriginal affairs. In this 1998 policy, the government unilaterally imposes certain «fundamental reference points» that are all designed to ensure domination and control over Aboriginal Peoples and our territories, particularly in the event of sovereignty. The reference points specified are: «territorial integrity» of Québec, «sovereignty of the National Assembly», and «legislative and regulatory effectivity».

> Secrétariat aux affaires autochtones, *Partnership, Development, Achievement* (Québec: Gouvernement du Québec, 1998), at p. 12.

194. Clearly, any appropriate government policy on Aboriginal affairs should be designed to advance recognition and respect for our human rights. It should respect Québec's constitutional and international human obligations. It should also put an to end existing policies of unilateralism, discrimination and colonization. These overriding concerns are elaborated further in the sub-headings below.

8.2 Denial of Cree fundamental status and rights

195. The Québec government refuses to recognize the fundamental status of Aboriginal Peoples as «Peoples» under Canadian and international law. Our status as Peoples is being denied by the government, with the goal of denying our right of self-determination.

> *... il est odieux de refuser aux autres un droit qu'on s'accorde à soi-même*. Si les Québécois ont le droit de décider qu'ils sont un peuple distinct du peuple canadien, *les Amérindiens* ... ou d'autres ont un droit équivalent. Ils peuvent décider qu'ils sont des peuples distincts du peuple québécois ou qu'ils ne sont pas des peuples distincts du peuple canadien.
>
> J.-P. Derriennic, *Nationalisme et Démocratie [:] Réflexion sur les illusions des indépendantistes québécois*, (Montreal: Éditions du Boréal, 1995) at pp. 73-74.

196. This government position violates our most basic human rights. It is a serious and continuing form of discrimination and is attracting increasing international criticism.

Denial of well-articulated Cree arguments for self-determination has forced the Québécois secessionist movement to adopt a blatant double-standard and a line of reasoning fraught with contradictions, which greatly undermines the legitimacy of their own claims and reveals the racist strain which often underlies the *realpolitik* application of self-determination theory.

> R. Guglielmo, *"Three Nations Warring in the Bosom of a Single State": An Exploration of Identity and Self-Determination in Québec*, (1997) 21 Fletcher Forum of World Affairs 197, at p. 198.

197. In addition, the latest policy programme of the Parti Québécois erroneously claims that, in the context of self-determination, there is a single «peuple québécois» made up of all of its citizens.

> Parti Québécois, *La volonté de réussir: Programme et statuts du Parti Québécois* (Montreal: Parti Québécois, 1997), at p. 1.

198. As described in this Brief, these positions are not shared by most people and commentators in Quebec, Canada and internationally. Even the Bloc Québécois in Ottawa is now recognizing that Aboriginal peoples have the status of «peoples and nations». As a result, the Québec government is increasingly isolating itself in retaining its discriminatory position.

> D. Lessard, «Les souverainistes cherchent un divorce à l'amiable», *La Presse*, (27 March 1999), at p. B1, (CROP poll taken in Montreal between March 11-21 indicates 80% of Quebecers polled are of the view that the Crees and Inuit constitute a people); P. Paquette & D. Turp, «L'offre de partenariat fait partie du projet souverainiste», *Le Devoir* (11 November 1999) A7 (Bloc Québécois); Assemblée nationale, *Journal des débats*, Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, 9 Oct. 1991, No. 5, at p. CEAS-137 (testimony of D. Turp).
>
> M. Seymour, *La Nation en question* (Montreal: Éditions de l'Hexagone, 1999), at p. 155; G. Bertrand, *Plaidoyer pour les citoyens* (Montreal: Les Éditions Balzac, 1996), at p. 40; P. Hogg, *Principles Governing the Secession of Quebec*, *[1997] 8.1 N.J.C.L. 19*, at p. 31; P. Russell & B. Ryder, *Ratifying a Postreferendum Agreement on Québec Sovereignty* (Toronto: C.D. Howe Institute, 1997), at p. 4; M.E. Turpel, «The Cultural Non-Homogeneity of Quebec: Secessionism, Indigenous Legal Perspectives and Inseparability» in D. Clark & R. Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996) 284; B. Schwartz, *Last Best Hope: Québec Secession - Lincoln's Lessons for Canada* (Calgary: Detselig Enterprises Ltd., 1998), at p. 25.

8.3 Refusal to recognize «inherent» Cree rights

199. In 1985, the National Assembly adopted a Resolution on Aboriginal rights that was introduced by the Québec government. The government and National Assembly proceeded with the adoption of this Resolution, despite the express and vigorous

objections of the James Bay Crees and other Aboriginal Peoples in Québec.

Motion for the recognition of aboriginal rights in Québec, adopted by the Québec National Assembly, March 20, 1985, reproduced in Secrétariat aux affaires autochtones, *Partnership, Development, Achievement*, *supra*, at 17-18.

Assemblée nationale, *Journal des débats*, March 19, 1985, vol. 28,l No. 38, at pp. 2504, 2527-2528 (objections of Crees, Inuit, Mi'kmaq, Mohawks and Naskapis brought to the attention of the Members of the National Assembly).

200. The 1985 National Assembly Resolution fails to recognize that the fundamental rights of Aboriginal peoples are pre-existing and inherent. Thus, Québec continues its policy of recognizing solely those rights that have been agreed to by the government through negotiated agreement. This unilateral Resolution has now been explicitly made a basis for Québec's latest policy on Aboriginal affairs.

> Secrétariat aux affaires autochtones, *Partnership, Development, Achievement*, *supra*, at p. 17.

201. Québec's position contradicts that of the Supreme Court of Canada. The Court has repeatedly ruled that the Aboriginal rights of Aboriginal Peoples are «pre-existing» or inherent.

> *Guerin* v. *The Queen*, [1984] 6 W.W.R. 481 at p. 497, 13 D.L.R. (4th) 321 at p. 335; *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 at p. 390.; *R.* v. *Van der Peet*, *supra*, para. 30.

> At the heart of our recommendations is recognition that Aboriginal peoples *are* peoples, that they form collectivities of unique character ... They are entitled to control matters important to their nations without intrusive interference. This authority is not something bestowed by other governments. It is *inherent* in their identity as peoples.
>
> > Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 5, at pp. 1-2 [emphasis added].

8.4 Extinguishment policy of Québec and federal governments

202. The federal policy of purportedly extinguishing the land-related rights of Aboriginal peoples has been described as a «another relic of colonialism».

> D. Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, (1993) 3 Transnat'l L. & Cont. Probs. 13 at p. 31.
>
> See also M. Seymour, *La Nation en question*, *supra*, at 158 (old method of extinguishment of Aboriginal rights must be abandoned by Québec).

203. The programme of the Parti Québécois indicates that agreements with Aboriginal Peoples should be concluded without purportedly extinguishing Aboriginal rights. However, the Québec government still insists upon extinguishment.

> Parti Québécois, *La volonté de réussir: Programme et statuts du Parti Québécois supra*, at p. 22.

204. Extinguishment of Aboriginal Peoples' land or resource rights is incompatible with the human rights of the Peoples concerned. It has been denounced by the United Nations Human Rights Committee and the Commission des droits de la personne du Québec.

> The Committee ... recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 [right to self-determination] of the Covenant [on Civil and Political Rights].
>
> > United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, *supra*, para. 8.

> Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: November 1993) at pp. 14 & 43.

> Related to lands and resources is the state policy of 'extinguishment' of the territorial rights of indigenous peoples. Given the international norms that have emerged to date, this odious concept must be thoroughly re-examined. The concept of extinguishment of indigenous peoples' rights to territory is completely anti-indigenous, especially in light of the recognition by the ILO Convention No.

169 of the 'special importance for the cultures and spiritual values of the peoples concerned for the relationship with their lands and territories' and the 'collective aspects of this relationship'.

> D. Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, *supra*, at p. 31.

205. Alternatives to extinguishment have been recommended by the Royal Commission on Aboriginal Peoples. Furthermore, the U.N. Committee on Economic, Social and Cultural Rights has underlined the «direct connection between Aboriginal economic marginalization and the ongoing dispossession» of Aboriginal Peoples and has highlighted that extinguishment policies «should on no account be pursued» by governments in Canada.

> Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995).

> The Committee views with concern the *direct connection between Aboriginal economic marginalization and the ongoing dispossession* of Aboriginal people from their lands, as recognized by the RCAP, and endorses the recommendations of the RCAP that policies which violate Aboriginal treaty obligations and *extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party*. Certainty of treaty relations alone cannot justify such policies. The Committee is greatly concerned that the recommendations of the RCAP have not yet been implemented in spite of the urgency of the situation.
>
> United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, U.N. Doc. E/C.12/1/Add.31, 4 December 1998, para. 18 [emphasis added].

206. In view of government extinguishment policies and other acts of dispossession and marginalization, the International Water Tribunal in the Hague has questioned whether the *JBNQA* is sufficiently compatible with the Cree self-determination and other resource-related rights.

> ... The jury recognizes the James Bay and Northern Quebec Agreement, *but it doubts whether such a contract adequately reflects the aspirations of the Crees to*

self-determination and control over resources.

> *Grand Council of the Crees* v. *Government of Canada et al.*, decision of the International Water Tribunal, Amsterdam, February 20, 1992, para. 1: This decision is reproduced in Second International Water Tribunal, *Dams* (Utrecht, The Netherlands: International Books, 1994) (Casebook), at pp. 294ff.

8.5 Undermining of future Treaty-making by Aboriginal Peoples

207. Section 35 of the *Constitution Act, 1982* provides constitutional protection for the existing Treaty rights of Aboriginal peoples, as well as for those negotiated in the future. It has taken Aboriginal Peoples over 100 years to persuade Canada to safeguard Aboriginal and Treaty rights.

208. Therefore, it is most disturbing to us that the Québec government is now imposing strategies and policies to circumvent or limit our access to s. 35 for future agreements.

209. According to Québec's 1998 policy on Aboriginal affairs, solely the «provisions relating to land aspects of a comprehensive land claim agreement will receive constitutional protection». For other matters, the new policy introduces a «contractual jurisdiction» approach, whereby agreements signed in the future «would not be covered by constitutional protection».

> Secrétariat aux affaires autochtones, *Partnership, Development, Achievement*, *supra*, at p. 22.

210. Treaty-making is a vital aspect and an important indication of the distinct status of the James Bay Crees and other Aboriginal Peoples. Constitutionally-protected Treaty rights are our best method of ensuring that our rights will not be violated in the future.

> Aboriginal Peoples are each a distinct «people» and «nation», as recognized under international and domestic law. The treaty-making capacity of Aboriginal Peoples is an important aspect and manifestation of their unique status.

> First Nations in Québec, «Fundamental Principles of Peaceful Co-Existence», adopted May 1998 (Secretariat of the Assembly of First

Nations of Québec and Labrador), Principle 2.

> Treaty making ... represents an exercise of the governing and diplomatic powers of the nations involved to recognize and respect one another and to make commitments to a joint future. It does not imply that one nation is being made subject to the other.
>
> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(1), at p. 18.

211. Governments that seek to avoid or otherwise undermine future treaty-making are continuing a policy of domination and control over Aboriginal Peoples. It is for this and other reasons that Québec's 1998 policy on Aboriginal Affairs has been unanimously rejected by the First Nations in Québec.

> E. Thompson, «First Nations reject new policy», *The [Montreal] Gazette*, (20 May 1998), at p. A5; M. Cloutier, «Les Premières Nations rejettent les propositions de Chevrette», *Le Devoir*, (20 May 1998), at p. A1.

8.6 Arguments of «*terra nullius*» by Québec government

212. In June 1996, in *R.* v. *Côté*, the Québec government argued before the Supreme Court of Canada that no Aboriginal peoples have possessed any Aboriginal rights in any part of the province for the past 450 years. As a result, the government alleged that s. 35 of the *Constitution Act, 1982* had no application in Québec in relation to the safeguarding of Aboriginal rights.

> *R.* v. *Côté*, [1996] 4 C.N.L.R. 26.

213. In putting forward this dispossession argument, the Québec government relied upon the doctrine of «*terra nullius*» («land belonging to no one»). The government was fully aware that this doctrine had been condemned in the *Mabo* case by Australia's highest court as being «unjust and discriminatory» when invoked against Aboriginal Peoples. Yet Québec chose to assert it before the Supreme Court.

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, *an*

> *unjust and discriminatory doctrine of that kind can no longer be accepted*.
>
> *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) [emphasis added].

214. In *Côté*, Chief Justice Lamer of the Supreme Court of Canada quoted the above words from *Mabo* and ruled as follows:

> ... the [Québec government's] proposed interpretation risks undermining the very purpose of s. 35(1) [of the *Constitution Act, 1982*] by *perpetuating the historical injustices suffered by aboriginal peoples at the hands of colonizers* who failed to respect the distinctive cultures of pre-existing aboriginal societies.
>
> *R.* v. *Côté*, *supra*, at para. 53.

215. Doctrines of superiority, such as *terra nullius*, are strongly denounced in international human rights instruments. Also, the Chiefs of the Assembly of First Nations of Québec and Labrador have unanimously condemned the discriminatory positions taken in *Côté* by the Québec government.

> ... any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere ...
>
> *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble.

See also *Discriminatory and Colonial Positions Taken by the Government of Québec Before Supreme Court of Canada: Denial of the Existence of Aboriginal Rights in Québec*, Resolution No. 11/96, Secretariat of the Assembly of First Nations of Québec and Labrador, October 17, 1996.

8.7 Inappropriate use of «territorial integrity» and «effectivity» strategies

216. As previously mentioned, Québec's 1998 on Aboriginal affairs establishes «reference points» for negotiating any new arrangements with Aboriginal Peoples on a wide range of

matters. In this regard, the 1998 policy stipulates:

> The agreements reached with aboriginal people must respect Québec's territorial integrity and government effectivity over its territory.
>
> Secrétariat aux affaires autochtones, *Partnership, Development, Achievement*, *supra*, at p. 21.

217. These international law doctrines are part of the Québec government strategy to create a new Québec state. It is highly inappropriate to impose such strategies on Aboriginal Peoples - especially in a government policy that is intended to enhance relations, improve socio-economic conditions, and address our fundamental concerns.

> Grand Council of the Crees, *Sovereign Injustice [:] Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec*, *supra*, at pp. 219-227 (territorial integrity) & pp. 143-169 (effectivity or effective control).

218. At international law, the principle of «territorial integrity» applies to independent states and not provinces.

> The maintenance or alteration of internal boundaries of an independent state is a matter which falls within the domestic jurisdiction of that state; it does not fall within the jurisdiction of international law.
>
> T. Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997), at p. 235.

> ... this principle [of territorial integrity] applies only with respect to limits established between existing States, not to administrative boundaries within a State.
>
> T. Bartoš, *Uti Possidetis, Quo Vadis?*, (1997) 18 Aust. Y.B.I.L. 37, at p. 73.

219. «Territorial integrity» is being illegitimately used by the Québec government to deny us our right to self-determination, should the government take steps to secede. However, in the Canadian and international context, it is the integrity of Aboriginal Peoples and our rights and societies that are of legitimate and ongoing concern.

> 1. Governments shall have the responsibility for developing, with the participation of the [indigenous and tribal] peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and *to guarantee respect for their integrity*.
>
> 2. Such action shall include measures for: ...
>
> (b) promoting the full realisation of the social, economic, and cultural rights of these peoples with *respect for their social and cultural identity, their customs and traditions* and their institutions ... (Art. 2, paras. 1 & 2(b))
>
> *In applying the provisions of this Convention: ...*
>
> *(b) the integrity of the values, practices and institutions of these peoples shall be respected ...* (Art. 5, para. (b))
>
> *Indigenous and Tribal Peoples Convention, 1989* [emphasis added].
>
> *Further, the draft U.N. Declaration on the Rights of Indigenous Peoples, provides that cultural genocide is associated with:*
>
> *Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities ...* (Art. 7, para. (a))

220. With regard to the international law principle of «effectivity», this term generally refers to «effective control» of a territory. In the context of Québec unilateral secession, «effective control» is what Québec authorities would need to demonstrate in seeking international recognition as an independent state.

221. First Nations in Québec have made clear our firm opposition to these exploitative strategies.

> Notions of territorial integrity, non-Aboriginal sovereignty and legislative or regulatory «effectivity» shall not be imposed on Aboriginal Peoples, so as to result in inequality, domination or other forms of colonialism.

> First Nations in Québec, «Fundamental Principles of Peaceful Co-Existence», *supra*, Principle 25.

> We [First Nations] affirm the Nation-to-Nation relationship based on equality and peaceful co-existence of peoples;
>
> We reject and dismiss the concept of territorial integrity of Québec ...
>
> > «Declaration of the First Nations of Québec and Labrador», Resolution adopted at Lac Delage, Secretariat of the Assembly of First Nations of Québec and Labrador, October 13, 1994

222. Nevertheless, the notions of «territorial integrity» and «effectivity» continue to be imposed in unjust and deceptive ways. For example, in a recently signed Political Accord to explore self-government with the Inuit of Nunavik, the government made no mention of these conditions within the agreement. However, in the Cabinet Decree that approves this Accord, specific pre-conditions include that any new government institution «must fall under the jurisdiction of Québec and respect the integrity of its territory and the effectivity of its government» [unofficial translation].

> «Political Accord between the Nunavik party, the government of Québec and the federal government for the examination of a form of a government in Nunavik through the establishment of a Nunavik Commission», November 1999.
>
> Gouvernement du Québec, Décret, No. 1138 -99, 6 October 1999, preamble.

223. These far-reaching pre-conditions take unfair advantage of the urgent need for self-government in northern Québec. They also violate the duty to negotiate in good faith. Moreover, the Political Accord stipulates, as an «overriding principle», that «arrangements for the establishment of a Nunavik government shall not modify the ... natural resource regimes established under the *JBNQA* ...» We are concerned that this may establish a government precedent that any self-government institutions negotiated with the James Bay Crees in the future would not have an adequate resource base.

> «Political Accord», *supra*, para. 5.1 h)

8.8 Imposition of unfair land selection criteria

224. During the *JBNQA* negotiations, the James Bay Crees were denied by Québec the right to select our own traditional lands for harvesting purposes, if the lands selected had any known mineral potential.

> *During the negotiation of the JBNQA, the Quebec government unjustly imposed specific criteria for land selection that excluded all Cree and Inuit traditional lands with mineral potential. This denied the Crees 'the inherent right ... to enjoy and utilize fully and freely their natural wealth and resources'. It constituted a major violation of the aboriginal right to economic self-determination. It still serves to perpetuate our dependency. No land claims agreement in Canada has prohibited aboriginal peoples from selecting lands with resource potential.*
>
> Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada* (Submission to the U.N. Commission on Human Rights, February 1992), at p. 100.

225. This severe and unconscionable condition was a wholesale violation of our human rights. It has never been redressed and continues to have far-reaching adverse consequences on our people and on the Cree Nation as a whole.

> In land selection negotiations, federal, provincial and territorial governments follow these principles:
>
> (a) No unnecessary or arbitrary limits should be placed on lands for selection, such as ... (i) the exclusion of coastlines, shorelines, beds of water (including marine areas), potential hydro-electric sites, or resource-rich areas ...
>
> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 2(2), at p. 576, Recommendation 2.4.6.

8.9 Unilateral appropriation of Cree traditional territory

226. In 1971, as part of Québec's development strategies, a huge James Bay Municipality in

Cree traditional territory was unilaterally created through the adoption by Québec's National Assembly of the *James Bay Region Development Act*.

> Prior to the James Bay negotiations, a huge James Bay Municipality was created on our land ... This was a massive, unilateral land-theft that included the power to exclude anyone for 'security reasons'. Quebec did not have the constitutional or any other right to rob us of our land in this way. The James Bay Development Corporation was established to deal with the 'development' of this municipality, OUR TERRITORY. [capitals in original.]
>
> Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at p. 17.
>
> See also *James Bay Region Development Act* (Bill 50), R.S.Q., c. D-8.

227. This huge territory was never returned to the James Bay Crees. To date, we are still deprived of an adequate land and resource base for the sustenance of the James Bay Cree People and for the exercise of genuine self-government.

228. The denial of an adequate land and resource base continues to violate our right to self-determination and other human rights. This ongoing injustice must be redressed on an urgent basis.

8.10 Abdication of environmental role and responsibilities

229. Where hydroelectric development is concerned, the Québec government has to a large extent abdicated its environmental role and responsibilities in *Eeyou Istchee*.

230. Although Hydro-Québec has narrow objectives in developing and generating hydroelectric power throughout the province, the Québec government has relegated an excessive degree of the responsibility for environmental research, data collection and monitoring to this Crown corporation. As a result, there is little or no way of determining if such activities are being carried out objectively or even in a relevant and effective manner.

231. This situation is exacerbated by a number of factors. First, the environmental problems

associated with the reservoirs of the La Grande Complex are insufficiently monitored and understood. Second, a Québec Cabinet Decree in 1995 grants Hydro-Québec excessive rights of use and control of waterways in major drainage basins (including La Grande).

> Gouvernement du Québec, Décret, No. 585-95, 26 April 1995.

232. Third, Hydro-Québec is claiming that information on reservoir levels, even on the nature of the reservoirs themselves, is privileged and confidential. Such confidentiality is asserted on the basis that Hydro-Québec's transactions are commercial in nature. This denial of vital information to the James Bay Crees subordinates the safety and interests of our People and the environmental integrity of *Eeyou Istchee* to the commercial objectives of Hydro-Québec.

> In sustainable development, everyone is a user and provider of information considered in the broad sense. That includes data, information, appropriately packaged experience and knowledge. The need for information arises at all levels, from that of senior decision makers at the national and international levels to the grass-roots and individual levels.
>
> > *Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, A/CONF.151/26 (vol. III), c. 40 (information for decision-making), para. 40.1.

233. The overall culture of secrecy of Hydro-Québec, with the collaboration and approval of the Québec government, is already the subject of widespread criticism. It seriously impedes the realization of sustainable development in our territory. Issues of undemocratic conduct have also been raised.

> M. Lacharité & É. Michaud, «La culture du secret et de l'imputabilité», *Le Devoir* (24 September 1999) A9; «Hydro needs more scrutiny», *The [Montreal] Gazette*, editorial (8 July 1998) B2; J. Robinson, «Chilling how easily rights were trampled for Hydro», *The [Montreal] Gazette* (26 February 1999) B2; A. Dubuc, «L'erreur des décrets», *La Presse* (26 February 1999) B2; J.-R. Sansfaçon, «La leçon de démocratie», *Le Devoir* (25 February 1999) A8.
>
> See also *Coalition des citoyens et citoyennes du Val Saint-François* v. *A.G. Québec*, [1999] R.J.Q. 511 (C.S.).

234. It is recognized internationally that determinations of sustainability are too often being

made on unreliable or inadequate information. The Québec government should be cooperating with the James Bay Crees to ensure that reliable indicators of sustainability are developed, so that the people, environment and resources of *Eeyou Istchee* are safeguarded.

> Commonly used indicators such as the gross national product (GNP) and measurements of individual resource or pollution flows do not provide adequate indications of sustainability. Methods for assessing interactions between different sectoral environmental, demographic, social and developmental parameters are not sufficiently developed or applied. Indicators of sustainable development need to be developed to provide solid bases for decision-making at all levels and to contribute to a self-regulating sustainability of integrated environment and development systems.
>
> > *Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, supra* c. 40 (information for decision-making), para. 40.4.

235. Moreover, in addition to strengthening development-related data collection, *Agenda 21* calls for special attention to be devoted to rights of access to resources and to Indigenous Peoples and our relationship with the environment.

> In addition to the strengthening of existing development-related data collection, special attention needs to be paid to such areas as demographic factors, urbanization, poverty, health and *rights of access to resources*, as well as special groups, including women, *indigenous peoples*, youth, children and the disabled, and their relationships with environment issues.
>
> > *Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, supra* c. 40 (information for decision-making), para. 40.8 [emphasis added].

236. The right of access to information concerning the environment in *Eeyou Istchee* must be assured for the James Bay Crees and our institutions. In addition, the Québec government must reclaim its environmental role and responsibilities from Hydro-Québec. For all sectors of development within its jurisdiction, the government must ensure the carrying out of relevant and adequate research and monitoring in *Eeyou Istchee*.

> All persons have the right to information concerning the environment. This includes information, howsoever compiled, on actions and courses of conduct that

may affect the environment and information necessary to enable effective public participation in environmental decision-making.

> *Draft Declaration of Human Rights and the Environment*, Meeting of international group of experts, United Nations, Geneva, 16 May 1994, para. 15.

237. Principles of access to and sharing of environment-related information are now being increasingly encouraged between states. Clearly such principles should also be implemented within existing states, such as Canada.

238. The abdication by the Québec government of its environmental role and responsibilities is not limited to hydroelectric development. In the case of other large-scale projects such as forestry and mining, we have a similar lack of confidence in the government's political will to act in the best interests of our People and our environment.

> The vital role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels through, inter alia, their *role in protecting fragile ecosystems, watersheds and freshwater resources* and as rich storehouses of biodiversity and biological resources and sources of genetic material for biotechnology products, as well as photosynthesis, should be recognized.
>
> *Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, A/CONF.151/26 (vol. III), Annex III (forest principles), Principle/Element 4 [emphasis added].

239. Further, we are concerned that the Québec government might approve massive exports of water from our territory against our wishes and interests. With regard to *Eeyou Istchee*, this issue has potentially massive implications and should be addressed solely with our full involvement.

240. Our grave lack of confidence in the government is reinforced by Québec's deplorable environmental track record throughout the province.

> B. Bisson, «Environnement: un autre zéro au gouvernement Bouchard», *La Presse*, (16 March 1999) A9; P. O'Neill, «'Cessez de saccager les forêts'», *Le Devoir* (24-25 April 1999) A1; L. Moore, «Wildlife group gives Québec failing grade», *The [Montreal] Gazette* (29 April 1998) A5; L.-G. Francoeur, «Le règne

> Bouchard a déçu les écologistes», *Le Devoir* (26 November 1998) A4; D. Clapin-Pépin, «Le MEF, ennemi publique no. 1 de l'environnement au Québec?», *Le Devoir*, (24 February 1997) A11; L.-G. Francoeur, «Le PQ décote Bouchard», *Le Devoir* (17 June 1997) A1; «Québec dirties its pollution policy», *The [Montreal] Gazette*, editorial (10 February 1997) B2; L.-G. Francoeur, «Des leaders environnementaux crient à la trahison», *Le Devoir* (28 November 1996) A4.

241. It is increasingly evident that there is a serious lack of adequate research, data collection and other relevant information concerning such as major projects as hydroelectric development, forestry and mining. This situation places the James Bay Crees and our communities, resources, environment and traditional territory at huge risk. It is incompatible with sustainable development. It also undermines our capacity to participate in environmental regulatory regimes and safeguard the interests and well-being of our People and *Eeyou Istchee* as a whole.

8.11 Denial of Cree rights of participation and consent

242. In many aspects of environmental management and conservation, the James Bay Crees continue to be marginalized by the Québec government in *Eeyou Istchee*. There is little or no meaningful role or effective participation concerning use and management of natural resources, or in ensuring sustainable development in our traditional territory. Respect for the essential principle of Cree consent in this context is a rarity.

> Indigenous peoples have been throughout history the victims of activities carried out in the name of national development. Their *direct participation and consent in decisions regarding their own territories are thus essential to protect the right to development*.
>
> > U.N. Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, *supra*, at para. 157 [emphasis added].

243. Through the Arctic Council, Indigenous Peoples and their organizations have a more expansive and active role in a high level transnational forum with all Arctic states, than we have within our own traditional territory in Québec. This is unacceptable.

> The Arctic Council is established as a high level forum to :

> (a) provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues ... (para. 1(a))
>
> The category of Permanent Participation is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council. (para. 2)
>
> *Declaration on the Establishment of the Arctic Council*, (1996) 35 I.L.M. 1387.

244. A genuine role for, and effective participation by, Indigenous Peoples in environment and resource matters is repeatedly emphasized in diverse international human rights instruments.

> Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Article 19.

> The rights of the [Indigenous and Tribal] peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, *management* and conservation of these resources.
>
> *Indigenous and Tribal Peoples Convention,* Article 15, para. 1 [emphasis added].

245. In addition, the importance of a participatory role for Indigenous Peoples is underlined in international instruments related to the environment and sustainable development.

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity,

culture and interests and enable their effective participation in the achievement of sustainable development.

Rio Declaration on Environment and Development, Principle 22.

In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.

Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, *supra*, c. 26 (recognizing and strengthening the role of indigenous people and their communities), para. 26.1.

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Declaration on the Right to Development, 1986, Article 1, para. 1.

Each Contracting Party shall, as far as possible and as appropriate: ...

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of *indigenous and local communities* embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and *promote their wider application with the approval and involvement of the holders of such knowledge*, innovations and practices and *encourage the equitable sharing of the benefits* arising from the utilization of such knowledge, innovations and practices ...

Convention on Biological Diversity, (1992) 31 I.L.M. 818, Article 8 (j) [emphasis added].

246. With respect to freshwater resources, the participatory role of Indigenous Peoples is

specifically highlighted, including training aspects.

> Integrated water resources management, including the integration of land- and water-related aspects, should be carried out ... [P]rincipal objectives should be pursued, as follows: ...
>
> (c) To design, implement and evaluate projects and programmes that are both economically efficient and socially appropriate within clearly defined strategies, based on an approach of full public participation, including that of women, youth, indigenous people and local communities in water management policy-making and decision-making ... (para. 18.9 (c))
>
> Implicit in virtually all elements of this programme is the need for progressive enhancement of the training and career development of personnel at all levels in sector institutions. ... Special provision should be made for mobilizing and facilitating the active participation of women, youth, indigenous people and local communities in water management ... (para. 18.62)
>
> *Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, *supra*, c. 18 (protection of quality and supply of freshwater resources).

247. Currently, the participation of the James Bay Crees and their representatives in the James Bay Advisory Committee on the Environment should be greatly improved, through adequate funding for JBACE and training opportunities. In addition, the role of JBACE as the preferential forum for responsible governments in *Eeyou Istchee* must be fully recognized and respected.

248. Consistent with the right of self-determination of the James Bay Crees, new institutions for environment and resource management should be negotiated for the longer term. These institutions should foster the realization of Cree self-government throughout *Eeyou Istchee*.

8.12 Promotion of cultural genocide

249. The *JBNQA* stipulates that there will be no social impact assessment for the proposed Great Whale and the Nottaway, Broadback and Rupert hydroelectric projects. It further purports to constrain the James Bay Crees from opposing or preventing these projects on sociological grounds.

> ... these known projects ... if built, shall be considered as future projects subject to the environmental regime only in respect to ecological impacts and that *sociological factors or impacts shall not be grounds for the Crees and/or Inuit to oppose or prevent the said developments* [emphasis added].
>
> *JBNQA*. s. 8.1.3 [emphasis added].

250. Section 8.1.3 is an unconscionable violation of our constitutional and international human rights. It runs counter to the principle of sustainable development, by seeking to exclude social, economic and cultural factors relating to our People. It illegally serves to deny us our right to development, as well as our means of subsistence.

251. Section 8.1.3 is intended to put us at the mercy of the Québec government and Hydro-Québec. It minimizes our value and jeopardizes our integrity as a distinct People and culture. It facilitates dispossession of our lands and resources. Overall, it promotes cultural genocide.

> Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
>
> a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; ...
>
> (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures ...
>
> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 7.

252. In addition, s. 8.1.3 purports to deny the Crees an effective remedy pertaining to far-reaching and fundamental human rights matters. This too violates our human rights.

> Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the

customs, traditions, rules and legal systems of the indigenous peoples concerned.

> Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Article 39.

Everyone has the *right to an effective remedy* by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

> *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), Art. 8 [emphasis added].

253. In light of our constant vigilance and opposition, it is unlikely that the Québec government or Hydro-Québec would seek to enforce this provision. However, it is a stark illustration of the efforts taken to marginalize us and dispossess us of our lands, waters and resources. It is also an example of the duress we faced during the negotiations of *JBNQA*.

8.13 Violation of constitutional principles and values

254. The importance of constitutional principles and values, such as the «protection of Aboriginal and Treaty rights», the «principle of democracy» and the «principle of federalism», has been already underlined in this Brief and will not be repeated here (sub-heading 2.4 *supra*).

255. In relation to water and other resource issues in *Eeyou Istchee*, these principles are not being respected by the Québec government. As we have described, there is little government will for genuine cooperation or partnership, on the basis of equality and respect for our human rights.

256. We urge that these deficiencies be seriously considered and addressed. They go to the very core of fairness and justice, as well as affecting intercultural harmony and trust.

8.14 Environmental racism and environmental justice

257. Environmental racism is not a wholly new phenomenon distinct from other forms of racism. Generally, it describes racial discrimination in an environmental context.

> *There is no distinct phenomenon of environmental racism, if seen as a manifestation of historical racism and antecedent structural forces influenced by that racism. Environmental racism is...more descriptive of forces that manifest themselves in racially disparate outcomes in hazardous environmental exposure. In that sense, 'environmental' not only modifies 'racism,' but ultimately corroborates it.*
>
> S. Foster, *Race(ial) Matters: The Quest for Environmental Justice*, (1993) 20 Ecology Law Quarterly 721 at p. 735.

258. The terms «environmental justice» and «environmental equity» are closely related to «environmental racism» and may often be used interchangeably.

> In regard to "environmental racism", see P. Lepage, «Un regard au-delà des chartes: Le racisme et la discrimination envers les peuples autochtones» (1995) 25 Recherches amérindiennes au Québec 29, at p. 40. Generally, see also R.W. Collin, «Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice» (1994) 9 J. Envtl. L. & Litig. 121; A.H. Robertson, «Environmental Racism: The Causes, Consequences, and Commendations» (1991) 5 Tul. Envtl. L.J. 155; Symposium, «Environmental Justice» (1994) 5 Md. J. Contem. Legal Issues 1; Symposium, «Environmental Justice: The New Wave» (1995) 14 Va. Envtl. L.J. 567.

259. Regardless of whether one refers to the presence of «environmental racism» or to the absence of «environmental justice», for the James Bay Crees it underscores the discrimination or bias we suffer in regard to environmental and development issues.

260. Such discrimination is often based on race and manifests itself in diverse disproportionate ways, including: i) disregard for our status as a «People» and violation of our right to self-determination and other human rights; ii) disregard for the principle of Aboriginal consent to proposed projects affecting us and our traditional territories; iii) marginalization or exclusion from any meaningful management role; iv) dispossession of our lands and resources in favour of development projects; and v) imposition of far-ranging adverse environmental and social impacts.

> Environmental Justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.

Principles of Environmental Justice, Proceedings to the First National People of Color Environmental Leadership Summit held on October 24-27, 1991, in Washington D.C., Principle 2.

CONCLUSIONS AND RECOMMENDATIONS

1. In terms of our history, culture and survival, *neebee* (Cree word for «water») has always been, and continues to be, of crucial significance to Cree individuals, Cree communities and the James Bay Cree Nation. *Neebee* is vital to the well-being of our traditional territory and its flora and fauna, and to the integrity of our sub-Arctic environment as a whole. Since we view ourselves as an integral part of our natural environment, the importance of *neebee* to us has profound and diverse dimensions.

2. *Neebee* has also been, and continues to be, the focal point of bitter disputes and conflict between the Québec government and the James Bay Cree People. Since the early 1970s, most of our court cases have involved *neebee*-related issues. In light of the life-giving and sustaining characteristics of this essential resource, we are committed to safeguarding its quantity and quality for present and future generations of our People in *Eeyou Istchee*.

3. For thousands of years, the James Bay Cree People has occupied, governed, used, protected, and managed its traditional territory, *Eeyou Istchee*, and continues to do so in a spirit of sharing. Our rights and interests with respect to our traditional territory, including lands, waters and resources, extend beyond the boundaries of Québec and include offshore islands and waters in James Bay and Hudson's Bay.

4. Throughout our history, the James Bay Cree People has suffered massive encroachment and dispossession in our traditional territory. These colonial actions - many of which still continue - have had far-reaching adverse effects on our lands, waters and other resources, and our northern environment. Moreover, these acts serve to erode or otherwise undermine our fundamental status and rights. They illegitimately impede our ongoing development as a distinct People and Nation.

5. The concerns outlined in this Brief could provide a key first step towards improving the current situation. This requires that this Commission take seriously the existing and recurrent problems faced by the James Bay Crees, in regard to water-related issues. It is also necessary to confront in a constructive and thorough manner the regressive and harmful strategies and policies of the Québec government whenever resource use, management and development matters arise concerning the Cree People and *Eeeyou Istchee*.

6. We urge the Commission to endorse the recommendations we put forward in order to develop a democratic framework that embraces human rights and which would enable the formulation of an appropriate *neebee* management policy for our traditional territory.

7. As outlined in this Brief, the persistent problems and conflicts we face in regard to *neebee* go well beyond the resource itself or related questions of development and management. An examination of the scientific and technical aspects of water management *per se* will never result in a suitable and lasting policy for our traditional territory. Such a narrow approach would run counter to the very principle of sustainable development.

Profound significance of water for James Bay Crees

8. In relation to *neebee* management in *Eeyou Istchee*, the concern of the James Bay Crees is not only for human life but also for the integrity of our environment, its ecosystems and all living things. Our view of water, land and the environment is as an integral and interdependent whole. We are a part of our land, ecosystems and resources. Our identity and spirituality are profoundly shaped by this relationship and world view.

9. Water is intricately involved in all aspects of Cree life. Safeguarding the integrity of our northern environment is inseparable from the conservation and management of our water resources. In view of the extensive and complex role of water in *Eeyou Istchee* and the interdependent nature of our environment and resources, it would make little sense for the Québec government to try and separate water rights from Cree Aboriginal, Treaty and other constitutional and human rights.

10. Any governments attempts to separate us from our relationship with water resources and deny us our water rights would be contrary to the laws of nature, as well as Cree perspectives, values and law. It would violate our human rights and the principle of sustainable development. It would add to our dispossession and marginalization and perpetuate a colonized government approach.

11. As the Supreme Court of Canada has indicated, land and resources issues concerning Aboriginal Peoples are matters of intersocietal law and not solely federal or Québec law. Therefore, in order to arrive at a fair and just reconciliation, the perspectives of

Aboriginal Peoples and non-Aboriginal governments must be *equally* considered.

Importance of a human rights approach

12. As the United Nations Environment and Development Programme strongly recommends, a human rights approach must be adopted in formulating any sustainable development strategy. Considering the profound significance and role of *neebee*, this approach must be fully and fairly applied to water management policy.

13. Coherence and justice both call for a human rights framework. Water management encompasses a number of fundamental aspects that are interrelated and interdependent. These include: environment, development, peace and human rights.

14. A human rights approach is also mandatory from the viewpoint of democracy. The principle of democracy and the protection of Aboriginal and Treaty rights are underlying constitutional principles and values in Canada. Therefore, it would be imperative that these principles be respected at every stage of water policy consultation, planning and development.

15. As the United Nations Human Rights Committee has emphasized, a human rights approach is especially compelling when Indigenous Peoples and our lands and resources are involved. In view of the dispossession and marginalization faced by Indigenous Peoples, a human rights approach is indispensable in order to both avoid and resolve conflicts.

16. Also, as evident from the draft *U.N. Declaration on the Rights of Indigenous Peoples* and other international instruments, the fundamental rights of Indigenous Peoples are human rights. Further, it is an internationally recognized principle that all human rights and fundamental freedoms are «universal, indivisible, interdependent and interrelated».

17. In the context of management of water and other resources, we must insist upon the fair and equal application of *all* of our human rights. Such equality and fairness is mandatory under international and domestic law. No government, including Québec, can choose which of our human rights it will respect and which it will deny us.

18. The indivisible, interdependent and interrelated nature of our human rights complements and reinforces our perspective of the integrity of the environment and resources of *Eeyou Istchee*. The environment and its resources and ecosystems - of which we are a part - are also integral and interdependent in nature. These complex relationships must be respected and preserved in any new water policy for *Eeyou Istchee*.

19. For all of the above reasons, resource, environment and development questions affecting Indigenous Peoples must be fully considered in a comprehensive human rights framework and context.

Significance of international considerations

20. It is important to note that the Public Consultation Document for this Commission highlights that Québec's actions in the area of water management must be exemplary. As the Document emphasizes, the government must, therefore, *not only «remain at the heart of international trends» but also anticipate international «approaches, orientations and rules»*. To date, this is precisely what the Québec government has failed to do in regard to water and other resource issues. Whenever Indigenous Peoples and our fundamental rights, interests and concerns are involved, the standards are curiously altered to our detriment.

21. At the international level, human rights standards relating to Indigenous Peoples are a significant and ongoing concern. In particular, these international norms are an essential component of sustainable development policy. Therefore, we would expect that any future water management policy affecting our People and *Eeyou Istchee* would fully incorporate such international human rights elements.

Principle of Cree consent

22. Consistent with Cree human rights in regard to lands and resources, it is imperative to recognize the principle of Cree consent. In particular, the right to give or withhold consent is an integral part of our right to self-determination and our right to development.

23. In addition, it is a constitutional requirement that Cree treaty rights under *JBNQA* not be amended without Cree consent. Every chapter of *JBNQA* is subject to a general consent

provision, or else includes a specific requirement for Cree consent to any amendment or modification.

JBNQA as a «living» Treaty

24. The *JBNQA* is a sacred Treaty that is intended to enhance cooperation between the James Bay Crees and the federal and Québec governments. Our Treaty is intended to be a «living» and dynamic agreement. It is to be continuously interpreted in a manner that is consistent with contemporary human rights.

25. Yet the Québec government tends to take the view that any rights of the Crees not specifically recognized or affirmed in the Agreement do not exist. This government approach is especially evident, whenever our rights to lands and resources are concerned. Rather than foster mutual trust and respect, this attitude serves to perpetuate our marginalization and dispossession. Equally important, it is incompatible with the obligation to respect our inalienable and inherent human rights.

Québec government strategies concerning Aboriginal Peoples

26. In assessing Québec's strategies and policies from a human rights perspective, the conclusions are extremely bleak for Aboriginal Peoples. Marginalization, exclusion, discrimination and domination are most often the prevailing factors. These elements are especially pervasive, where resource and development issues are concerned.

27. To a large degree, the policies and strategies of the Québec government concerning the James Bay Crees and other Aboriginal Peoples are dictated by its political agenda towards Québec sovereignty. Our human rights are accorded little or no consideration. Aboriginal peoples' status and rights are recognized solely in a manner that may not «impede» the government's secessionist aspirations.

28. Examples of this are found in Québec's own policy document on Aboriginal affairs. Clearly, any appropriate government policy on Aboriginal affairs should be designed to advance recognition and respect for our human rights. It should respect Québec's constitutional and international human obligations. It should also put an end to existing

policies of unilateralism, discrimination and colonization.

29. Past and present evidence of inappropriate policies and actions by the Québec government against the Crees and other Aboriginal Peoples is amply provided in this Brief. These examples depict a history of systematic and ongoing human rights violations.

30. This evidence includes:

* denial of Aboriginal Peoples' fundamental status and rights
* refusal to recognize that our basic rights are «inherent»
* imposition of an extinguishment policy
* undermining of future treaty-making by Aboriginal Peoples
* invoking racially discriminatory arguments, such as *terra nullius*, in court cases
* exploiting the need for self-government in Aboriginal Peoples' territories, by imposing pre-conditions favouring Québec secessionist strategies
* denial of an adequate resource base for self-government
* imposition of unfair land selection criteria
* unilateral appropriation of vast areas of Cree traditional territory
* abdication of the government's environmental role and responsibilities in *Eeyou Istchee*
* denial of rights of Cree participation and Cree consent in environmental and development matters
* promotion of cultural genocide
* violation of constitutional principles and values
* environmental racism or lack of environmental justice.

31. This historical and continuing pattern of marginalization and domination by the Québec government must first be acknowledged by this Commission. Only then can this unacceptable situation be truly redressed. In regard to the James Bay Crees and other Aboriginal Peoples, it is critical that a principled human rights framework be established in Québec as we approach the new millennium.

Breaking down the barriers of exclusion and marginalization

32. In order to break down the barriers of exclusion and marginalization, concrete measures need to be taken on an urgent basis. In regard to the water-related matters in *Eeyou Istchee*, these measures include: recognition of our right to use, control and manage our natural resources; and recognition and respect of our human rights. In this context, our right to self-determination and our right to development are especially relevant.

33. A further central issue concerns the democratic principle. Contrary to the position of the Québec government, democracy is not so simplistic as a «50% plus one vote». This mantra of the Québec government is repeatedly being used to drown out Cree and other Aboriginal voices and deny us our right to self-determination. In a federation with various constituent peoples and governments, the principle of democracy is much more profound and equitable. It goes well beyond the government's own self-serving position.

34. As the Supreme Court of Canada has often made clear, Canada is a representative democracy. The values inherent in the notion of democracy include a «commitment to social justice and equality», as well as «respect for cultural and group identity». Democracy is also said by the Court to include the «right to effective representation» and not simply «one person, one vote». Democracy, the Court adds, is «fundamentally connected to substantive goals, most importantly, the promotion of self-government». These democratic values and goals are directly relevant in considering the rights, institutions and processes relating to water management in Cree traditional territory.

35. With regard to the James Bay Crees, it is the constitutional principles of democracy and protection of Aboriginal and Treaty rights that are continuously being violated by the Québec government. This is especially true whenever water and other resource-related issues in *Eeyou Istchee* are involved.

36. In regard to the principle of federalism, there are those who would define the Canadian federation in terms of solely federal and provincial governments - or else «two founding

nations» - in order to exclude or diminish us. However, this is not what the Constitution recognizes. We, as Aboriginal Peoples, have our own Part II of the *Constitution Act, 1982* and we cannot be marginalized or excluded.

37. Inherent in the principles of federalism, democracy and the protection of Aboriginal and Treaty rights is that cooperation is required among federal and provincial governments and Aboriginal peoples and our governments. This cooperation should take place in a spirit of mutual accommodation, equality and respect for human rights.

38. Such intergovernmental cooperation is clearly necessary in addressing water-related matters.

Violation of Treaty and other rights of the James Bay Crees

39. The James Bay Cree Nation is strongly in favour of the establishment of a *comprehensive* policy on water management in Québec. In view of the far-ranging impacts we have suffered and continue to suffer in *Eeyou Istchee*, it is crucial that an equitable, balanced and culturally-sensitive policy be formulated to address present and future challenges and needs.

40. However, we cannot accept that the formulation of a *neebee* management policy for *Eeyou Istchee* has been delegated by the Québec government to this Commission - an entity that is alien to us and our territory.

41. Under the *JBNQA* (s. 22.3.24), the James Bay Advisory Committee on the Environment (JBACE) has been established now for many years as a «consultative body». It is explicitly designated as «the preferential and official forum» for responsible governments in relation to the whole environmental and social protection regime in our northern territory. Moreover, the *JBNQA* expressly recognizes that the James Bay Crees have a «special status and involvement» in terms of this regime (s. 22.2.2 c)).

42. It is clear that the effectiveness of the JBACE as a consultative entity is being unjustly minimized by the Québec government. This is being done by denying JBACE a mandate to consult on water management in *Eeyou Istchee*; denying adequate funding to JBACE so as to effectively carry out the full range of its responsibilities; and violating the spirit

and letter of the *JBNQA* Treaty.

43. Cree involvement in the JBACE does not *per se* constitute a «vital role» in environmental management and development or «effective participation» in achieving sustainable development. However, Québec's actions to minimize the role and operations of JBACE is a sad reflection of the extent to which the government will go to impede cooperation and diminish Cree participatory rights.

44. In addressing important *neebee*-related issues, we choose to act as a People and Nation. It is with this status that we seek to pursue our economic, social, cultural and political development, through our own institutions. We do not accept to be effectively diminished to a «citizens group», pleading our major concerns before a Commission that is foreign to us and that is imposed against our wishes.

45. In relation to water, there continue to be numerous and extensive adverse impacts of a diverse nature from major development projects (hydro, forestry, mining) in *Eeyou Istchee*. In view of the extent to which our People and territory are being put at risk, we would expect that Québec would ensure us a substantial and defining role and involvement.

46. The denial of a participatory and planning role in relation to these major development projects, as well as in water management policy, constitutes a violation of our human rights as described in this Brief. These rights include our right to self-determination, right to development, right to participation and rights to resources.

Specific recommendations as to mandate

47. In view of this problem of mandate and the constitutional duty to respect our Treaty rights, we propose that this Commission make the following recommendations in relation to the James Bay Crees and *Eeyou Istchee*:

* that the JBACE, or other joint entity that may be negotiated by the Cree and Québec government parties, be mandated and adequately funded to carry out a comprehensive consultation on water management in *Eeyou Istchee*

* that a human rights approach and framework be adopted in formulating a

comprehensive *neebee* management policy in *Eeyou Istchee*

* that past and current problems relating to the strategies and policies of the Québec government be fully considered, with the objective of establishing a principled framework for water management in Cree traditional territory

* that all of the above work be carried out in a democratic manner that respects the status of the Cree People as a People and our Aboriginal, Treaty, and other constitutional and human rights.

48. It is critical that a comprehensive approach be adopted in relation to *neebee*-related subject matters. For too many years, there have been water-related questions pertaining to hydroelectric development, forestry and mining that entail far-ranging and persistent impacts for the James Bay Crees and *Eeyou Istchee* (see examples in Annex, *infra*).

49. These water-related development questions must be adequately dealt with in any comprehensive water management policy. Moreover, we must be a full participant in shaping the issues and seeking adequate approaches and solutions.

ANNEX I: OVERVIEW OF ISSUES OF CONCERN IN *EEYOU ISTCHEE* AND RELATED RECOMMENDATIONS

This Annex is not intended to be exhaustive. However, we provide an overview of a number of key issues of concern to the James Bay Crees. As a minimum, the JBACE and the BAPE should join efforts in further documenting and addressing the policy issues associated with water management. Under existing circumstances, the responsibility for such an undertaking should not rest solely on the shoulders of the Cree People.

The concerns expressed in this Brief and its Annex seek to reflect closely those that were expressed already in the first phase of the hearings when the joint commission travelled to Ouje-Bougoumou, Chisasibi and Whapmagoostui. During these first hearings, there were a broad range of questions addressed but only a limited number were answered. It is expected that the questions addressed by the Cree communities will receive the necessary attention.

I. IMPACTS OF LA GRANDE HYDROELECTRIC PROJECT - EXTENSIVE AND ONGOING CONCERNS

- The environmental problems associated with the reservoirs of the La Grande Complex are not sufficiently understood. This is particularly true for people in southern Quebec. A large number of studies were carried out by the proponent of this project and some harsh lessons were learned on the evolution of reservoirs, diversion zones, rivers with reduced flow, rivers with increased and regulated flows and estuaries. This listing alone should speak for itself in terms of the size, scale and complexity of this project and its environmental and social impacts. The Société d'énergie de la Baie James (SEBJ) itself, in its 1988 overview of environment-related activities of the first phase of La Grande, was addressing it as an «environmental challenge».

- The Cree Nation and its people view with tremendous concern the major reservoirs of the La Grande Complex, with a combined area of nearly 15,000 km2, and the evolution of the diverted rivers – especially the La Grande, whose average flow has doubled year-round and which behaves like a weekly spring flood in winter.

- The Commission on Water Management must not ignore the fact that the La Grande Complex is the largest human-made alteration of aquatic ecosystems in North America. The amount of land required for the production of energy in this kind of physical environment (i.e. the amount of land flooded for

each terawatt-hour of energy produced each year) is exceptionally large. It is probably larger than for any other hydroelectric development in North America (see, for example, the data on this subject at page 24 of Hydro-Québec's Strategic Plan, 2000-2004).

- The reservoirs themselves, despite the fact that their area is equivalent to about half of Québec's land under agricultural production, are inaccessible and invisible to the great majority of Québécois. Emphasis is first and foremost placed on the «engineering success». Visitors at the sites are left with the erroneous impression that the impacts have dissipated as illustrated by the neatly landscaped surroundings of the dams and dykes.

RECOMMENDATION

(1) All of the environmental studies produced by SEBJ and Hydro-Québec need to be audited by outside, independent organizations. For those few projects that were reviewed by the environmental bodies that operate under the JBNQA and for which monitoring studies were required, one cannot consider that these monitoring studies were audited in a comprehensive fashion. The severe lack of resources provided to these review bodies has no doubt adversely affected the auditing process. Also, the problem of inadequate funding must be redressed.

(2) Particular attention must be given to the social, cultural and economic impacts of these hydroelectric projects. Much emphasis was put so far on biophysical studies and very little on social dimensions.

(3) Before any further projects are even considered, this audit should be used in producing a state-of-the-environment report for Eeyou Istchee and should be fully taken into account in the development of a water management policy.

(4) Past models of joint collaboration for the conduct of these post-assessment studies can provide some important lessons. Examples include the Federal-Provincial Task Force and the Biophysical Agreement that allowed for the conduct of numerous studies, from 1972 to 1979, in collaboration with the SEBJ. However, this model did not allow for direct Cree participation and these

studies did not examine social impacts. Such serious omissions violate Cree rights and must be avoided in the future at all costs.

2 RESERVOIRS - DENIAL OF ACCESS TO KEY INFORMATION

- The long-term status of the reservoirs and their operation by Hydro-Québec is a key concern to the James Bay Crees and should be for the public in general. In 1995, a Québec government Decree (No. 585-95) was adopted, which dealt with Hydro-Québec's rights of use of hydrological resources throughout the province. The Decree grants to Hydro-Québec rights of use of water resources for the sole purpose of energy generation. In this manner, the corporation appears to have acquired from the Québec government virtually exclusive rights to the use of many of the river systems in Québec (including the newly created La Grande basin). This one-sided arrangement effectively excludes uses other than those specifically related to energy production.

- There are few, if any, other examples where a corporation with limited public accountability has been granted by the state such extensive rights of control of waterways in major drainage basins.

- The content of this Decree stands in sharp contrast to the public claims of Hydro-Québec – reflected in the corporation's development plans - regarding hydroelectricity as an example of sustainable development. Perhaps this provides sustainable sources of revenue for the Crown corporation, but it is not sustainability in any credible ecological sense. The commitment to single-purpose reservoir use, the failure to consider the interests of other potential users of reservoirs, and the irreversible changes made to both terrestrial and aquatic systems make the claim to sustainability appear shallow and disingenuous.

- The loss of certain estuarine fisheries, significant reduction in the geographical range of certain species, and the gradual disappearance of certain fish species from major reservoirs all suggest that the Hydro-Québec's claims regarding the sustainability of hydroelectric development require closer critical examination.

- Hydro-Québec, in its recently released Strategic Plan, explains at p. 42 that it is seeking accreditation from the international system of standards for environmental management known as ISO 14001, i.e. for environmental performance. This represents a set of management tools, principles and procedures.

However, central to the idea of implementing an environmental management system (EMS) is the definition of an environmental policy. This policy should be founded on the concept of sustainable development. Moreover, this undertaking should generate broadly-based public debate about the ecological implications of hydroelectric development, and in particular of Hydro-Québec's current control of both reservoir water levels and the flow of regulated rivers. It should lead also to an audit of past performance (including past performance in agreements signed with the Crees).

- The water management policy must clarify what is the current public accessibility to information on reservoir levels and on the nature of the reservoirs themselves. Such important information must not be kept privileged and confidential. Confidentiality should not be considered as necessary, solely because of the commercial nature of Hydro-Québec's transactions as claimed by the corporation. It is essential to ensure accessibility to fundamental hydro-meteorological data on all of Québec's watersheds developed for hydroelectric purposes. Access to this key information must not be subordinated to claims of commercial privilege. In North America, where water supplies are generally regarded as a public good, this is a distinct anomaly.

- The Cree People have an extensive and direct interest in these matters because the reservoirs themselves, as well as the regulated rivers of the La Grande Complex, are located in their own hunting territories. At the same time, there are public policy issues associated with reservoir operations, which should also be of concern to the whole Québec population.

RECOMMENDATION

(1) The following are some central policy questions that need to be addressed:

The disproportionate granting of rights to Hydro-Québec with respect to water resources in Québec and the apparent subordination of all others forms of water use to hydroelectric energy production.

The need to balance Cree rights and interests and the public interest with Hydro-Québec's exercise of water rights, including its virtually exclusive rights to the use of water resources.

In regard to fundamental hydro-meteorological data on all of Québec's watersheds developed for hydroelectric purposes, the adverse implications of subjecting the availability of such data to tests of commercial privilege. This issue must not be left solely for the Régie de l'Énergie to decide.

The Crees must be recognized as having the right to a privileged access to information, commensurate with Cree Treaty and other constitutional and human rights.

(2) The definition of sustainable development in Eeyou Istchee cannot be determined by Hydro-Québec and/or the government of Québec alone. The James Bay Crees must be assured a full, active and ongoing role. Moreover, any definition of sustainable development in Cree territory must be fully consistent with a human rights approach.

3. MERCURY - GOVERNMENT INDIFFERENCE AND NEGLECT

- Mercury is a contaminant associated with hydroelectric development, the manufacture of pulp, metal mining and refining operations, and more recently with forestry operations. Mercury has had major implications throughout Eeyou Istchee on the harvesting of wildlife resources by the James Bay Crees. Mercury contamination, in its overall effect, has severely hampered the exercise and enjoyment of Cree Treaty rights under the James Bay and Northern Québec Agreement. These rights were intended to ensure the maintenance and further development of the Cree economy based on subsistence hunting and fishing, as well as facilitate economic development activities based on fishery resources (e.g. commercial fisheries).

- The documented history of mercury contamination in Eeyou Istchee spans a period of nearly 30 years. It has involved the neurological assessment at one point of nearly half the Cree adult population, the investigation of the early development of an entire cohort of young children, the repeated collection over the years of literally thousands of blood and hair samples for mercury analysis, and the analysis, in all, of nearly 30,000 specimens of fish for their mercury content.

- Despite this prodigious commitment of effort and resources, remarkably little effort has been made to assess with the Cree population the various sources of information which have been gathered, and to provide the population with the information it needs for its own risk assessment purposes. Much of the data collected was intended to serve the needs and corporate policy objectives of individual institutions, notably Hydro-Québec. In particular, the precise nature of the health risks posed by exposure to mercury both for adult Crees and for the unborn child remain, in many respects, unclear. There is still an inadequate basis for the balanced assessment of risks associated with long-term, low levels of exposure to mercury from the consumption of fish.

- Meanwhile, the general preoccupation with the risks posed to the unborn child has resulted in a widespread and deep decline in subsistence fisheries and in the consumption of fish by most individuals under the age of 50. The changes in dietary practice, and consequently also of hunting and fishing strategies, are no doubt linked to other changes in Cree food production practices. The overall result has been a marked rise in cardiovascular disease in general, and in particular in the prevalence of non-insulin dependent diabetes. This is now seen as being of epidemic proportions, and is linked with the decline in the fisheries during the last three decades.

- Despite the claims made by Québec at the time of the negotiation of the JBNQA about the assumption of responsibility for health services for the Cree population, and about an increasing presence in environmental policy in the north, the Québec government in key respects turned its back on the Crees in the years following the negotiation of the JBNQA. At the same time, the federal government chose to withdraw its own services and expertise on the grounds that mercury had become a provincial responsibility. The Crees often felt abandoned in dealing with the whole issue of mercury and Hydro-Québec. This lack of government concern took place, despite the established framework of the Mercury Agreement, which was signed in 1986 and lasted for 10 years. The first phase of the public hearings in the Cree communities appear to confirm this observation.

- When it was discovered, in the early 1980s, that reservoirs were invariably associated with sharp (4- to 6-fold) increases in fish mercury levels, mercury became Hydro-Québec's problem. The corporation was left by the governments of Canada and of Québec essentially to its own devices in this area. In this way, they inherited responsibility for 'managing' the Cree mercury problem.

- There is much that could be said on this topic. The key messages for the Commission, however, are that the Cree population has over the years been greatly hampered in its efforts to take ownership of the problem of environmental mercury contamination. The key toxicological and epidemiological issues remain largely unresolved. The exposure standards which are now being given serious consideration both in Canada and the U.S.A. make it effectively impossible to reconcile subsistence fisheries with recommended limits to human exposure. Meanwhile, minimal attention is being paid to the problem of risk assessment, and to the balancing of mercury exposure against the public health consequences of the loss of subsistence food production systems.

- The topic of environmental mercury contamination - and the related toxicological issues related to human exposure - merit much closer attention by the Québec government. There is intense

interest in this subject in nearby states and provinces, and Quebec appears as a regional anomaly – a region and a political jurisdiction with a significant large-scale problem of contamination on its hands, but with minimal manifestation of interest by regulatory authorities. Interest is sorely lacking even in regard to the nature of the problem, let alone the means of addressing it through appropriate mitigation or control strategies.

- Methyl mercury contamination is a water-related issue, and current research, especially in the Great Lakes region, increasingly points to surface water quality and land use changes as driving factors in determining levels of contamination in fish species used for human consumption.

RECOMMENDATION

(1) Methyl mercury contamination is a water-related issue. This issue, and the related problem of the transport and bio-accumulation of persistent organochlorine contaminants (which are poorly documented in the sub-arctic regions of northern Quebec) must receive much greater attention. Surface water quality and land use changes appear to be driving factors in determining levels of contamination in fish species.

(2) Closer attention must be provided to the topic of environmental mercury contamination - and the related toxicological issues connected to human exposure.

(3) The Commission must examine more closely how contaminants are monitored in the region and how information to communities in the north about contaminants in the environment and their impacts is made accessible.

(4) The provincial government has for all intents and purposes has delegated the management of the mercury issue to Hydro-Québec. The government of Quebec has been silent on the issue of mercury, since the termination of the Mercury Agreement in 1997. In fact it never had any involvement in the monitoring program that Hydro-Québec was conducting on the content of mercury in fish. None of the Cree institutions have any direct involvement either. The Cree Health Board is left with no financial resources to continue to address the impacts related to the decrease in fishing activities and fishing consumption that was inherited from the mercury problem. A water management policy cannot continue to ignore this ongoing saga of government negligence.

(5) Serious attention must be paid to the problem of risk assessment, and to the balancing of

mercury exposure against the public health consequences of the loss of subsistence food production systems. These social, cultural and health dimensions of hydroelectric development deserve to be addressed. They must not be seen as a simple mitigating issue in regard to a proponent's project.

(6) The Commission on Water Management needs to determine what kind of monitoring studies on mercury must be carried out in the next 10 to 20 years and the appropriate role of governments in this regard. The Cree cannot and should not be left alone to address this growing and serious problem.

4. PUBLIC SECURITY AND INSPECTION OF DAMS

- The coastal Cree communities of Chisasibi, Wemindji and Eastmain are situated downstream from a project which includes reservoirs with a total volume of the order of 200 cubic kilometres, approximately half of which is available for the regulation of energy production. The number of dams and dikes required for these multiple reservoirs, and the volumes of water involved, raise important questions about public safety.

- The importance of public involvement in issues arising from the inspection of dams, and consequently of making information about the condition of these hydraulic structures available to the communities affected by them, was specifically raised, in the context of the La Grande Complex, by the Nicolet Commission. This Commission conducted the inquiry into the flooding in the Saguenay – Lac St-Jean region in 1996 (Rapport: Commission scientifique et technique sur la gestion des barrages, Québec, January 1997).

- Sufficient information has been acquired in recent years through the Commission sur l'Accès à l'Information to raise significant concerns about the integrity of some of the hydraulic structures of the La Grande Complex. In particular, simulations carried out by Hydro-Québec of the propagation of flood waves following a major failure in one (or a sequence of) dams have raised genuine concerns about the safety of these communities.

RECOMMENDATION

(1) The issue of dam safety must be pursued by the Commission on Water Management. Clearly, it

is an inescapable part of water policy in northern Québec.

(2) It is vital to investigate and assess the measures which have been taken to implement the recommendations of the Nicolet Commission. Emphasis is especially needed on Cree community involvement, in issues related to the inspection of hydraulic structures and the development of the appropriate capacity for emergency response.

(3) It is also important to provide the communities with some basic tools and guidelines to assist them in getting involved in the necessary emergency planning. This is particularly necessary due to the complex nature of the technical information and data relating to dam and dykes structures and reservoir operations.

5. HYDROELECTRICITY, FORESTRY AND MINING - NEED TO MONITOR ECOLOGICAL EFFECTS OF LAND USE CHANGES

- Forestry operations in Eeyou Istchee also lead to important policy issues in the management of both water quantity and quality. During the last thirty years, forestry operations have clear-cut an area equivalent in size to the reservoirs of the La Grande Complex, and are continuing at a rate of 600 – 700 sq. km. each year.

- Forestry operations on this geographical scale have significant regional implications for regional hydrological budgets. The overall effect is to increase run-off (because of reduced transpiration losses, and to expose river systems to marked increases in flood intensity (because of a shorter hydrological response time, linked both to vegetation and soils).

- The documentation of such effects at a regional level requires sophisticated networks of gauging stations and appropriate precipitation monitoring. It also depends on the capacity to determine hydrological responses before and after logging (or fires). Such capacity is not available in northwestern Québec, and the magnitude of the hydrological effect of logging operations is therefore unknown. However, the literature from experimental watersheds is more than sufficient to lead us to expect significant effects. In the Chibougamau area, the theoretical estimates of increase in annual discharge would be in the range of 38% according to M. Thibault as cited in the «Manuel de Foresterie» (1996).
- Similarly, logging affects soil water regimes, and with them the rate of decomposition of organic

matter and the release of trace metals. Large-scale logging operations should be expected to be accompanied by increases in the release of dissolved organic matter and trace metals, and the production of suspended sediment. This, combined with the construction in headwater catchments each year of several hundred kilometres of forestry roads and trails, again leads one to expect regional-level changes in surface water quality.

- Poor or improper road placement and construction techniques are often responsible for serious erosion problems. Roads built in low-lying areas often become flooded during springtime, leading to heavy erosion of the roadbed. This causes erosion problems similar to those related to clear-cutting. Improper use of culverts, mainly using drainage culverts too narrow for peak water flows, often leads to spring flooding and washouts. As the roadbed is washed away the culvert is exposed and then later crushed by heavy machinery. Once crushed, water flow is impeded or blocked altogether, thus leading to further erosion as the water finds a new course.

- Failure to remove bridgework on winter roads can often cause serious erosion. Bridging of small watercourses on winter roads usually consists of logs laid across the channel with soil, moss and snow piled on top. If not removed before spring thaw, these makeshift bridges can be washed downstream with the soil and organic material being washed into the watercourse.

- As the forest is cleared and the trees are de-limbed, the remaining organic material, or slash is plowed into large piles at roadside. These piles can often impede the flow of ditches and small watercourses, thereby leading to more erosion as the water pools and searches for a new course.

- Since the surface temperature of an open clear-cut block is higher than that of the sheltered forest floor, the temperature of rapidly draining water can be higher than water draining under natural circumstances. Moreover, warmed pooled water in ruts created by heavy machinery, or drainage blockages due to improper slash piling can be suddenly released through traumatic rainfall. This may influence local water temperatures. In each case, sudden change in local temperature regimes may threaten temperature-sensitive species such as brook trout.

- Employing culverts that are too narrow causes damming and pooling during peak flows. As the water backs up, it pools and then erodes the roadbed and the resulting material is washed into the watercourse, again raising turbidity levels and impairing local aquatic habitat.

- Improperly placed winter roads can seriously impair the flow of small watercourses leading to pooling and increases in the local water temperature.

- Monitoring with the degree of sophistication needed to detect, and to evaluate the consequences of trends in water quality is simply not taking place. As with the water quantity data, the absence of data does not mean that changes are not taking place.

- The lack of monitoring in the territory is illustrated also by the Lake « Sainte-Lucie» case, where for years now the community of Oujé-Bougoumou tried to get the regional office of Environment Québec to explain the brown coloration of small Lakes downstream from a large sawdust residue pile. The change in colour has been observed since 1986 and, except for two analyses (one in 1987 and one in 1995), nothing was done to restore the situation. The trappers of the community are concerned about this phenomenon and do not use the Lakes. The problem seems to be expanding downstream over time.

- There is also a long history of mining in Eeyou Istchee. We are able to identify approximately 30 such mines since the region was opened to the south. Many of these operations involve the extraction of sulfide-rich ores, and have the acid-rock drainage potential. Again, the ability to detect and to evaluate such effects depends on the kind of data collection systems in place.

- Impacts of mining were particularly severe on the hunting territories of Oujé-Bougoumou and Waswanipi ,as mentioned in the first set of hearings. However, issues related to mining expand also beyond these two areas.

- Québec currently relies on very limited time-series of data for point-source effluents (tailings ponds), and the same data is eventually communicated to the federal government for the purposes of the application of the Fisheries Act. Québec does not attempt to monitor directly the ecological effects of mining operations. The current approach to the administrative control of environmental aspects of mining operations (there is no regulation, nor is one contemplated at this time) does not include provision for monitoring ecological effects.

- We therefore find ourselves in a situation where there is essentially no monitoring data for the forestry and mining components of the natural resources based economy of the region. We suspect that, in this respect, the other major administrative regions in Québec face the same kind of problem. In the absence of relevant monitoring networks, and a political commitment to acquire the kind of information needed to generate responses to these questions, it may be impossible to gauge accurately the extent and significance of the ecological consequences of these resource-based industries. Apparently, this serves the interests of negligent and uncaring governments.

- *There is a popular belief, we suspect, that Hydro-Québec monitors the ecological effects of its own activities and is thus particularly well-placed to judge the ecological significance of its own activities. We do not believe that this is the case. We see very little evidence that Hydro-Québec is tracking the hydrological impacts of its operations. We believe that the water quality and fisheries data collected by the corporation also do not (and probably were not intended) to pick up the ecological effects that are the targets of scientific inquiry elsewhere in North America.*

- *For example, the mobilisation of organic carbon and of trace metals in reservoirs raises technical issues similar to those posed by forestry and mining. However, a close examination of the data collected by Hydro-Québec will confirm that very little data is being generated which would enable us to detect ecological shifts in reservoir systems (except, in a very general and obvious sense, during the first few years after flooding).*

- *This problem can be illustrated using mercury. Hydro-Québec is planning several river diversions in order to augment the energy output of existing power stations (both in northern and eastern Québec). The company also knows – mainly from studies of fish along the Caniapiscau River – that spillway discharges result in statistically significant increases in fish mercury levels far downstream.*

- *Hydro-Québec has had difficulty accounting for this phenomenon; it has found itself acknowledging on the one hand the downstream effects of opening spillways, but also arguing that one reservoir does not significantly affect the next reservoir downstream. We think that the underlying problem here is that Hydro-Québec does not have the kind of data on the mobilisation and transport of methyl mercury to account for its observations of mercury levels in fish.*

- *Until now, Hydro-Québec has been largely free to decide for itself what ecological data to collect in connection with the assessment of its own operations. The inadequate programmes which Hydro-Québec instituted during the construction of the La Grande project come to an end in 2000;*

- *Meanwhile, Hydro-Québec's own claims concerning respect for the principle of sustainable development and the conservation of biological diversity can only be tested with data which Hydro-Québec has collected, i.e. on its own terms. We believe that a closer examination of the relevant data reveals that Hydro-Québec is not in a technically founded position to evaluate these claims – neither for fish, benthic macro-invertebrates nor other components of aquatic ecosystems.*

RECOMMENDATION

(1) A comprehensive review of technical aspects of the monitoring required for natural resource-based projects – hydroelectricity, forestry and mining - is necessary for the development of recommendations for future policy action.

(2) The government of Québec must be required to review critically the scope and standard of the studies carried out so far by Hydro-Québec and to conduct an investigation of key ecological issues requiring a long-term perspective. Such a review or audit should be conducted under the supervision of a scientific panel and must ensure a full and direct Cree involvement.

(3) The Cree hunters of Chisasibi and nearby communities strongly believe that there are a number of outstanding issues which need attention and they need to be involved closely in the design, conduct and output review of monitoring and research studies.

(4) Review Panels or Committees operating under chapter 22 of the JBNQA should be required to publish their analyses of Environmental Impact Statements and of Monitoring Studies submitted by proponents.

(5) Data from monitoring of mining effluents collected by mining companies should be accessible to the public on a regular basis. All mines should be subject to mining regulations directed at environmental effects monitoring. Presently, they are subjected to Directives 019 on an ad hoc basis and which does not include environmental effects.

(6) The lack of Monitoring studies on the «environmental performance» of the regulations respecting the standards of forest management of the Forest Act in the Cree territory must be addressed within the water management policy. Particular attention should be directed at Lake Mistissini, where lake trout and speckled trout are a prized and sensitive resource. Very large tracts of forest were cut in recent years in the immediate watershed of the lake and, combined with the effects of fires, there is serious concern over the impact on water quality and the fish resources. This is the largest natural lake in the province.

(7) The growing multitude of diverse impacts facing Cree communities and Cree territory at local levels is most troubling. Also, their overall cumulative impacts for larger areas have not been thoroughly investigated. What is the impact when several small watercourses with high levels of turbidity flow into a

larger lake? What is the cumulative impact on a creek whose flow has been impeded by several road crossings where improper culverts have been used? How does changing water retention levels, and the loss of the natural filtering ability of hundreds of hectares of forests--their root system and moss--affect water quality and the creatures that depend on that quality? Research concerning the cumulative impacts that forestry developments may have on water quality has received very little attention from researchers.

6. CLIMATOLOGY, HYDROLOGY AND WATER POWER

- *The Cree People of Eeyou Istchee share with Canadian society at large a general concern about the implications for Cree society of regional climate change during the lifetime of Cree children. Also, the La Grande hydroelectric project, because of the scale of its reservoirs, is large enough to influence the water budget of the drainage basin in which it is situated. Water evaporates from reservoirs. The overall effect is not only to reduce the amount of energy available to the Québec population as a whole, but the amount of water reaching the rivers and estuaries downstream from the project.*

- *We have the strong impression that the river gauging stations in Eeyou Istchee were created and operated solely to short-term data for planning hydroelectric development, and that the production of a longer-term data base relevant to the issue of regional climate change was subordinated to this goal. In our view, long-term hydrological and climatological records should be important for Hydro-Québec, as well as for the James Bay Crees, Québec and Canada. We are concerned by the silence surrounding this issue. In the absence of such data, it will be difficult, if not impossible, to evaluate the relation between precipitation and run-off, and therefore the long-term energy production from Hydro-Québec's plant. Similarly, the prospects for identifying, and certainly evaluating, regional climate change will be seriously constrained.*

- *The recent launching by Environment Canada of the Northern Ecosystem Initiative (NEI) may help bring attention to climatic issues. The NEI however has a meagre budget that cannot suffice to meet the priorities that were set up by the Department. A total budget of $4.5 million for five years is available for all of Canada to address climatic changes, long range transport of contaminants, biodiversity and impacts of large development projects. Québec has yet to announce any such strategy for Eeyou Istchee and Nunavik.*

RECOMMENDATION

(1) Public discussion is required on the kind of information needed, not just by the Cree population but by Québec as a whole, on the subject of both regional climate change and the hydrological consequences of northern hydroelectric development.

(2) A thorough review of the adequacy of the basic framework for the collection of hydro-meteorological data in northern Québec is required, including the adequacy of the existing run-off data. In some respects, this recommendation is linked to our concerns about the issues of Hydro-Québec's water rights and the confidentiality of hydrological data described in a previous section.

(3) It is important to determine the extent to which the level of control over hydro-meteorological data compromises efforts to understand the process of climate change in Québec in general, and more particularly the regional impacts of projects such as the La Grande hydro-electric development.

(4) A broad base debate is urgently needed on the research priorities of the north, where a fair balance will have to be found between the needs and knowledge of the northern communities and those of the entire country. Proponents to meet their own development needs promote narrow, self-serving studies in the north and this focus must change at once.

7. WATER SUPPLY AND WASTE WATER MANAGEMENT

- It is now evident that two of the Cree communities face continuing water supply problems linked to hydroelectric development. We refer here to Chisasibi (where the problem relates to the withdrawal of water from the La Grande river in conditions of bank instability and continuing erosion and suspended sediment transport, particularly in winter), and to Eastmain (where the diversion of the Eastmain River is the major factor driving the search for a stable long-term source of potable water for the community). In both cases, the Crees incurred difficulties to involve Hydro-Québec into the search for long-term solutions.

- The Inuit community of Kuujjuarapik and the Cree community of Whapmagoostui are faced with a problem of saline intrusion at their water intake at certain times of the year. These communities do not have a wastewater treatment system and raw sewage is delivered to Hudson's Bay. The issue

is left unattended by government authorities. A lot of this inaction could be blamed on the «ghost» of the Great Whale Hydroelectric project. Residents must not be made victims of this unacceptable wait-and-see attitude. The Aboriginal peoples concerned are entitled to have water intake and other drinking water problems addressed. These issues should not be left in the hands of a proponent. Governments have a responsibility to deal with these urgent questions now.

- Approximately one-half of the Cree population in Eeyou Istchee draws community water supplies from lakes or large rivers; and the remainder from post-glacial deposits of sand, silt and gravel. There is, on the one hand, an emerging concern about trihalomethane (THM's) production during the chlorination of water sources containing appreciable amounts of organic matter. On the other hand, there is continuing public avoidance of chlorinated water supplies. THM's have been implicated in bladder cancer in several epidemiological studies in North America and are becoming the object of increasing regulatory attention.

- Cree society – a society still made up largely of hunters and their families – spends a relatively larger proportion of its time away from permanent settlements, where each family is responsible for its own water supply. This feature of Cree hunting life places the population at relatively high risk of exposure to protozoan parasites (such as Giardia Lamblia) and probable also to a broad range of potentially pathogenic bacteria and viral particles.

- As long as Cree society remains in this manner engaged in hunting (but with hunting camps increasingly fixed locations), so the need for secure sources of water supply will remain. The Cree population therefore has a particular interest in the development of small-scale technologies for the production of relatively small volumes of parasite-free water, which at the same time is not a significant dietary source of trihalomethanes.
- Most of the Cree population also depends on aerated lagoons for the treatment and final disposal of wastewater from community collectors. These lagoons were generally conceived using standard off-the-shelf rules for determining the size and air requirements of the lagoons. We are conscious of the shortage of operating data for such systems in northern climates, and the need for real-world data both for planning and for optimizing the performance of these systems.

- The Cree hunting camps referred to above also require facilities for the disposal of human waste. The nature of the hunting camps has steadily been changing over the years. The need for a concerted policy for human waste management is becoming more pressing – especially for the large seasonal camps used for waterfowl hunting.

RECOMMENDATION

(1) The government of Québec needs to carefully re-examine its options and encourage the development (and approval) of installations which reflect the installation and operating constraints imposed by northern climatic and soil conditions. Collaboration is sought by the Cree communities to assist in the development of an adequate monitoring program coupled with a scientific and engineering review of the results.

(2) There is much to be learned from a careful assessment of the performance of the wastewater treatment systems that have been built during the last twenty years. There is a need for government support of the development and assessment of technologies required for northern communities (both for water and wastewater treatment systems). The remote location, the small size of the communities and climatic conditions are all factors that must be taken into account. The recently published report of the «Comité sur les nouvelles technologies de traitement des eaux usées» (by Municipal Affairs) is an example of such an initiative, but it did not consider the northern context.

ANNEX II: GROUNDWATER CONCERNS IN *EEYOU ISTCHEE* AND RELATED RECOMMENDATIONS

On December 1, 1999, on behalf of the Grand Council of the Crees (Eeyou Istchee), Grand Chief Ted Moses made a presentation before a joint panel made up of members from the Commission on Water Management and the James Bay Advisory Committee on the Environment. In response to the questions posed by panel members on the essential issue of groundwater, the present Annex has been added to this Brief.

GROUNDWATER

- If the integrity of the environment in *Eeyou Istchee* is to be safeguarded, the quality of its groundwater resources must be ensured. Currently, the groundwater resources of Eeyou Istchee are poorly documented. The available information, although limited, suggests that groundwater associated with the fluvioglacial deposits in the interior of *Eeyou Istchee* is generally of excellent quality. There is however a problem of uranium, as indicated in the regional profile drafted by the Québec Ministry of the Environment, the extent of which is not known precisely.

- Adequate knowledge and protection of groundwater resources are important factors in land-use planning, at both regional and community levels.

- At a regional level, the population density is very low. Presently, *Eeyou Istchee* does not experience the pressures on groundwater resources characteristic of regions of intensive agricultural activity, or those with long-term problems of past disposal of industrial liquid effluents. However, serious problems can and do exist. For example, a significant loss of cyanide into groundwater, adjacent to one of the major mines in *Eeyou Istchee* (Troilus), has required extensive pumping in order to remove contaminated groundwater and transfer it to tailings ponds.

- The extent to which shallow groundwater resources are affected by problems of acid rock drainage in the course of the extraction of metal sulphides has received little study in *Eeyou Istchee*. The mineralogical characteristics of a number of mining operations lead us to believe that this is a matter requiring further field investigation. Immediately to the southwest, in the mining district extending from Val d'Or to Noranda, there is a well-recognized and serious long-term problem of acid rock drainage in geochemical provinces not very different from those in *Eeyou Istchee*. Seepage from tailing ponds into the groundwater table needs closer assessment and understanding.

- In regard to the major hydroelectric reservoirs of the La Grande Complex, it is likely that

their operation has a regional effect on groundwater systems. Significant winter draw down – of the order of 5 to 15 meters – combined with large areas and shoreline development indices – probably results in a seasonal 'pumping' effect. Such an effect has been documented elsewhere (notably Finland). We do not know the extent of the effect on shallow and deep aquifers of these fluctuations in the perimeter of these reservoirs (e.g. is the effect felt within a radius of 1 km. of each reservoir or does it extend much beyond?).

- This is an important mechanism for transferring trace contaminants into overlying water bodies and then into drainage systems downstream. It may be an important factor in the methyl mercury contamination known to be associated with the hydroelectric reservoirs in northern Québec. It is of deep concern to the Crees that this potentially important dimension of mercury contamination in relation to hydroelectric development has not been studied by either the Québec government or Hydro-Québec. This must also be studied in relation to fault systems in the bedrock of the region.

- Groundwater movement as a mechanism for transferring water and associated contaminants into surface water drainage systems is a problem that can be difficult to address. It is the physical behaviour of groundwater which is responsible for the transfer of contaminants. This aspect of groundwater hydrology requires further study in *Eeyou Istchee*. It has potential relevance to the transport of contaminants as a result of land use disturbances which affect soil water balances. A significant example is in relation to forestry operations.

- It is important to implement in *Eeyou Istchee* a policy which is designed to prevent the unintended local contamination of groundwater supplies used by adjacent occupants of the land.

- In general, the concept of protected perimeters can be beneficially applied in *Eeyou Istchee*, especially in relation to Cree communities. The planned development of a nest of shallow wells in a moraine aquifer at Eastmain will provide an important test case for the implementation of measures designed to protect groundwater resources.

- Several Cree communities rely on groundwater for their local drinking water distribution systems (i.e. Oujébougoumou, Waswanipi, Eastmain, Wemindji and Nemaska – approximately 30% of the Cree population). Eastmain faces practical difficulties in that water with an elevated salt content lies close to the surface. Wemindji, for its part, has been concerned about traces of uranium in its water supply. At this point, residents feel at risk since it is unclear to what extent special treatment procedures may be required to reduce any dissolved uranium. The community is presently experimenting with a special filter system to diminish the uranium concentration.

- Within these Cree communities, the Cree people face important issues in the protection and conservation of groundwater resources similar to those encountered in community

settings elsewhere in Québec. In particular, community activities can contribute to the contamination of groundwater supplies. Soil and groundwater characterization studies, carried out by the Cree Regional Authority, indicate that most Cree communities are affected to varying degrees by groundwater contamination (e.g. leaks and spills from gas bar operations, former diesel generating stations, etc.).

- There are no commercial operations at this time for the extraction and marketing of water of quality suitable for bottling. However, two of the communities located near the extensive fields of eskers and outwash gravel in the eastern portion of our territory (Mistissini and Oujébougoumou) are actively investigating local groundwater resources suitable for bottling.

RECOMMENDATION

(1) The need for reliable research and documentation of groundwater resources in *Eeyou Istchee* must be expressly recognized. In particular, the effects of major developments such as hydroelectricity, mining and forestry must be fully assessed and monitored on an ongoing basis. *In a territory as vast as Eeyou Istchee, the carrying out of adequate hydrogeological studies represents a major though important challenge.*

(2) In order to avoid groundwater-related problems relating to sand and gravel excavation, the mapping of surficial deposits must be completed for the entire territory. Currently, the state and extent of surficial deposits mapping are unclear and need to be evaluated.

(3) Effective planning and measures must be initiated, in collaboration with the James Bay Cree People and its communities and institutions, to increase the level of protection of groundwater resources in *Eeyou Istchee*. This must be done in respect to all serious problems and challenges that may affect groundwater quality in the territory.

(4) In the context of a comprehensive groundwater policy, protected areas around groundwater sources must be appropriately defined. In addition, concrete preventive measures must be taken to avoid the contamination of groundwater resources likely to be used for water supply purposes. *In this regard, the needs and concerns of Cree communities are an important priority.*

(5) A policy on water management must also address situations where groundwater movement itself is a source of contamination. The cases of mercury and acid rock drainage illustrate this point. In this regard, adequate research must be initiated that

would assist in the evaluation and control of this particular route of environmental contamination.

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